Brief for Harry H. Dudley

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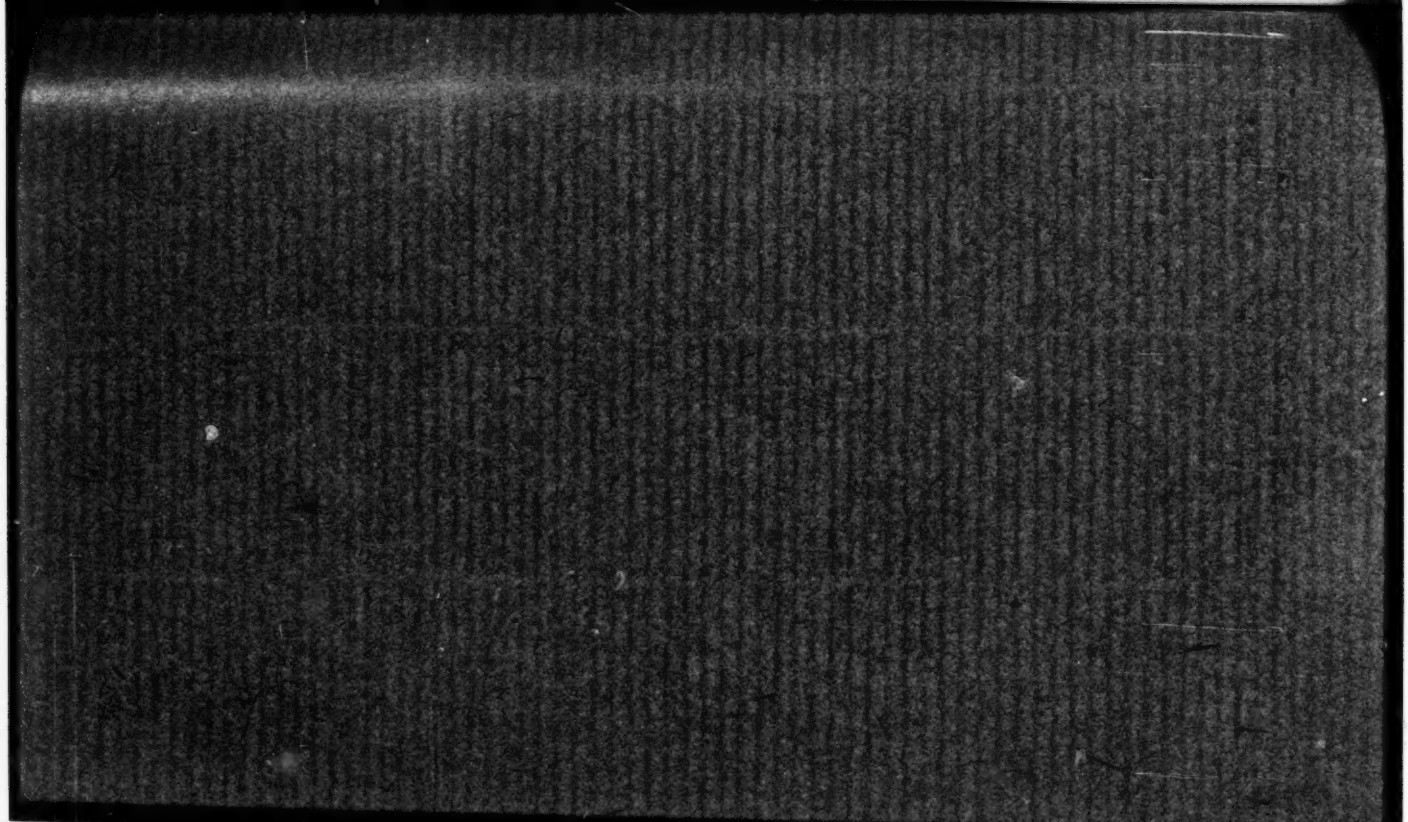

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Appendix.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 177.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, Colorado,

Petitioner,

vs.

HARRY H. DUDLEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR HARRY H. DUDLEY.

Statement of the Case.

We here print as our statement of the case (inserting in brackets our references to the record) the statement made by the United States Circuit Court of Appeals as follows (Record, p. 142):

"This action was brought to recover the amount of a large number of coupons, aggregating $26,500 exclusive of interest, which had formed part of and been attached to bonds of said County of Lake, in the State of Colorado, which had been issued to the amount of $50,000, on or after September 6, 1880, but bearing date July 31, 1880, for the purpose of erecting necessary public buildings for said county. Said bonds bore interest at the rate of ten per cent per annum, payable

annually on the first day of April of each year, at the office of the County Treasurer of said county, upon delivery of the attached interest coupons. The bonds were redeemable at the pleasure of the county after ten years, and were due and payable at the office of the County Treasurer twenty years from the date thereof. [Complaint, Record, pp. 3–8; Evidence, Record, p. 26.]

The coupons maturing upon these bonds before April 1, 1884, were all paid as they matured, at the office of said County Treasurer, but no coupons maturing at or after that date have been paid, the coupons sued on being among those unpaid. [Complaint, Record, p. 5; Answer, Record, p. 11.]

The answer of the defendant denied knowledge or information sufficient to form a belief as to whether plaintiff was the owner and holder of any of the coupons, or had become the purchaser of them for a valuable consideration, without notice of any claim affecting their validity. [Record, p. 10.]

But the principal defense, variously stated in the answer, was, in substance, that under the Constitution and laws of the State of Colorado, the Board of County Commissioners of the said County of Lake had not, when they issued said bonds, any power or lawful authority to issue the same, for the alleged reason that by the issue of such bonds a debt of said county was contracted, or the prior debt of said county increased, to an amount prohibited by the Constitution of said State, and that from the existing facts and circumstances shown by the records of said county, all purchasers of said bonds were bound to take notice of their invalidity. [Answer, Record, pp. 11–15.]

Section 6 of Article XI of the Constitution of Colorado, as it stood prior to the year 1888, was as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads, and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, $1.50 on each thousand thereof; counties in which such valuation shall be less than five millions of dollars, $3.00 on each thousand dollars thereof. And the aggregate amount

of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not exceed twice the rate upon the valuation last herein mentioned: provided, that this section shall not apply to counties having a valuation of less than one million of dollars.

The said bonds contained a recital upon the face of each bond, as follows [Record, pp. 4, 26]:

"This bond is one of a series of fifty thousand dollars, which the Board of County Commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of the majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled 'An act concerning Counties, County officers and County Governments, and repealing laws on those subjects,' approved March 24th, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

Secs. 20 to 25 inclusive of said act were also printed upon said bonds [Record, pp. 27-29], and contained all the provisions of said act, relative to the action of the Board of County Commissioners in determining upon the necessity of creating an indebtedness for the purpose of erecting necessary public buildings, making or repairing roads and bridges, and by order specifying the amount required, and submitting the question of incurring the debt to a vote of the qualified electors at a general election, by posting of notices; also prescribing the form of ballots and manner of voting and canvassing the vote, and the authority of the County Commissioners in case the vote should be carried to contract the indebt-

edness, and the limitations upon such authority, and the form and purport of the bonds to be issued, and provision to be made for the payment of the interest and principal of the bonds, and a provision that they should not be sold at a discount of more than fifteen per cent of their par value.

Sec. 21 of said act contained a provision, as follows: "Provided, that the aggregate amount of indebtedness of any country exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five million of dollars, $6.00 on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, $12.00 on each thousand dollars thereof."

The action of the Board of County Commissioners preliminary to and in submitting to vote of the qualified electors of said county, at the general election held October 7, 1879, the question of creating an indebtedness of $50,000, for the purpose of erecting necessary public buildings, and $5,000, for the building and construction of public roads and bridges, was strictly in conformity with said act. [Record, pp. 81-95.] The election was duly held, and the vote on that question duly had and canvassed and found and declared to be carried. [Record, p. 93.] And all the acts and doings were properly recorded, and the bonds prepared, executed and issued in strict accordance with the provisions of said act. And the bonds were sold for ninety-five cents on the dollar of their par value, [Record, pp. 80, 90, 91, 94-95, 32-33] and have, since within one year of their issue, been held and owned by purchasers for full value without actual notice of any illegality or infirmity in said bonds. [Record, p. 40.] The plaintiff is the holder of the coupons sued upon, by delivery of the same with properly executed written assignments thereof to him, by the former owners of such coupons, but without payment by him of any amount therefor [Record, pp. 33-38.]

The assessed valuation of taxable property in said County of Lake for the year 1879 was $3,485,628, and for the year 1880 was $11,124,489, and such assessment was completed on the first day of September in each

of said years by the action of the Board of Equalization. [Record, p. 47.]

Sec. 30 of the act above referred to made it the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, and publish them in some weekly newspaper published in the county, or if no such newspaper be so published, to cause such statements to be posted in three conspicuous places in the county, one being the court-house door, showing the amount of debt owing by the county, in what it consists, what payments have been thereon, the rate of interest, and a detailed account of receipts and expenditures for the preceeding months, and striking a balance showing the deficit or the balance in the treasury. "And the statement thus made, in addition to being published as before specified, shall also be entered of record by the Clerk of the Board of County Commissioners, in a book to be kept by him for that purpose only, which book shall be kept open to the inspection of the public at all times." There was no evidence in the case that any such semi-annual statement made by the Board of County Commissioners for said County of Lake at the January or July sessions of said board in the year 1880, had ever been entered of record in any book kept for that purpose only, as required by said act. The fair inference from the testimony is that no such record was ever made.

Upon the trial, the defendant to prove its allegation that on July 31, 1880, the date of said bonds, and also at the time they were issued, the aggregate outstanding indebtedness of said County of Lake was largely in excess of the amount of the extreme limitation fixed by the Constitution of said State, and the act aforesaid, offered in evidence a book kept in the years 1880 and 1881 by the County Clerk of said Lake County, called the "County Clerk's Account Book," and purporting to contain, among other things, detailed statements of the financial condition of said county on January 1, 1880, July 1, 1880, and January 1, 1881, and the same was admitted in evidence by the court, over the objection and exception of plaintiff, that it was not the record provided for by said act, nor the semi-annual statement of the board required by said act. [Record, p. 63 *et seq.*] Much other evidence tending to show the existence of outstanding warrants and indebtedness of said county at the time of issuing said bonds, to an

amount largely in excess of the aggregate amount of indebtedness which the county could, under said constitutional limitations, lawfully incur, was offered by defendant, and admitted by the court, over the objections of the plaintiff that the same was incompetent and immaterial. [Record, p. 73 *et seq.*]

At the conclusion of the evidence, the court refused all of the plaintiff's requests for instructions to the jury, and instructed the jury to return a verdict for the defendant; to which refusal and instruction exceptions were duly taken by the plaintiff. [Record, p. 113–114] The jury accordingly found for the defendant, and judgment for the defendant was entered upon the verdict. [Record, pp. 114–115, 17.]

WRIT OF ERROR TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.—The plaintiff obtained an allowance of a bill of exceptions (Record, pp. 18–116), which expressly states that it contains all the evidence (Record, p. 113), and sued out a writ of error to the United States Circuit Court of Appeals (Record, p. 135), and filed an assignment of errors (Record, pp. 117–230). The United States Circuit Court of Appeals heard the case on writ of error, and rendered judgment reversing the judgment of the Circuit Court, and sending the case back for a new trial (Record, p. 152; opinion of the court, record, pp. 142–152).

PETITION FOR REHEARING IN THE UNITED STATES CIRCUIT COURT OF APPEALS.—The county filed a petition for a rehearing (Record, p. 154), which petition was on consideration denied by the United States Circuit Court of Appeals (Record, pp. 163, 164).

PETITION BY DEFENDANT TO THE UNITED STATES SUPREME COURT FOR CERTIORARI TO BRING THE SAID CASE TO THIS COURT.—Afterwards the defendant the Board of County Commissioners of Lake County filed in this court a petition for a writ of *certiorari* to bring to this

court for review the judgment of the United States Circuit Court of Appeals, which writ was granted, and the record has been accordingly returned (Record, pp. 166-169).

ARGUMENT.

I.

Before proceeding to the examination of the specific questions raised on the record, which show that the plaintiff is clearly entitled to judgment, we desire to call the attention of the court to certain facts which show that moral justice, and honest and fair dealing, equally entitle the plaintiff to such judgment.

The county of Lake incurred this indebtedness for the purpose of building a court house, which was emphatically a legitimate county purpose. The court house—a handsome, substantial and commodious building—was constructed, and has ever since been used, and is now being used by the county, and the county thus received full value for its bonds.

This is shown by the records of the county introduced in evidence by the defendants the county commissioners (Record, pp. 75-95), and by the testimony of Mr. PARKS, who says (Record, p. 33):

"I was attorney of the county from about the 11th day of February, 1879, to the 15th day of April, 1880, when I resigned; I was reappointed the 23d day of April, 1883, and served until the 1st of January, 1890; and I had more or less to do with the county business, and knew Mr. Roberts personally, and had my

office close by and saw the court-house going up, and saw the work and know all about it."

Vote of the people of the County.—This indebtedness was incurred pursuant to a direct vote and authorization of the people of the county at the general election held October 7, 1879. See the record introduced in evidence by the defendants the county commissioners, Record, pp. 75-95.

Recital in the bonds.—Afterwards, and pursuant to such vote, and pursnant to the statute authority, the county issued the bonds in question, containing a recital as follows (Record, pp. 4, 26):

"This bond is one of a series of fifty thousand dollars, which the Board of County Commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of the majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and *in compliance with an act* of the General Assembly of the State of Colorado, entitled 'An act concerning Counties, County officers and County Government, and repealing laws on these subjects,' approved March 24th, A. D. 1877, and *it is hereby certified that all the provisions of said act have been fully complied with* by the proper officers in the issuing of this bond."

The statute referred to in the said recital, namely, the act approved March 24, 1877 (General Laws of Colorado, 1877, p. 223, sec. 21), contains the same limitation upon the indebtedness of the county as that provided in section 6 of article xi. of the State constitution (see said section 21, this brief, p. 52) as respects indebtedness of this kind voted upon by the people, namely:

"*Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of

property shall exceed $1,000,000 for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed $5,000,000, $6 on each $1,000 thereof; counties in which the assessed valuation of property shall be less than $5,000,000 and exceed $1,000,000, $12 on each $1,000 thereof."

These bonds with these recitals were issued and sold for full value and the proceeds used in building the court house as above stated, and passed into the hands of Savings Banks and other holders, all but one or two of whom were non-residents of Colorado, and all said holders assigned the coupons in question to Mr. Dudley, the plaintiff in this case.

This is the record on which the county seeks to repudiate its bonds, and the county officers and their learned counsel are now here asking the sanction of this court to such repudiation. To the question whether, according to morality and justice, honesty and fair dealing, they ought to succeed, there can be but one answer. We proceed to show that, even according to the strictest rules of law as well as morality, the county has no defense.

It is not contended or objected against the validity of the bonds that they were not issued pursuant to the statute. The only objection urged is that the amount of the indebtedness, together with the other indebtedness of the county, exceeded the constitutional limitation.

II.

The plaintiff was a bona fide holder, or entitled to the rights of a bona fide holder, of the coupons in question.

These bonds were sold by the county at 95 cents on the dollar, and the proceeds were used in building the court house. See the county records introduced in evidence by the defendants the county commissioners, Record, pages 75-95. Most of these bonds were purchased from the county by L. E. ROBERTS, the contractor who built the court house. About $11,000 of them were purchased by WALTER H. JONES (Record, pp. 80, 75-95). The said Roberts afterwards built the said court house (Testimony of DANIEL E. PARKS, Record, pp. 32, 33). The Circuit Court of Appeals says: "The County of Lake received full consideration for these bonds" (Record, p. 151). Roberts paid the county 95 cents on the dollar for the bonds (Record, p. 91). E. W. Rollins purchased for value of Roberts, the contractor (Record, p. 40; Wright's Ev., Rec., p. 19). On these facts the said Roberts and the said Jones were clearly *bona fide* purchasers of the said bonds.

That the person who first takes bonds from a municipal corporation under such circumstances, as well as any subsequent taker, may be a *bona fide* purchaser for value is well settled by the decisions of this court in *Commissioners vs. Bolles*, 94 U. S., 104, and *Montclair vs. Ramsdell*, 107 U. S., 147. In this latter case this court said, Mr. Justice HARLAN giving the opinion (p. 160):

"This question was directly adjudged in *Commissioners vs. Bolles*, 94 U. S., 104. One of the issues

there was whether the plaintiff was a *bona fide* holder of certain municipal bonds. After stating that the legal presumption was that they were, the court, speaking by Mr. Justice STRONG, said: 'But the plaintiffs are not forced to rest upon mere presumption to support their claim to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by paying an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fraud in their issue.' The court proceeded: 'And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a *bona fide* purchaser for value? The law is undoubted that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.'"

Afterwards E. W. ROLLINS bought $39,000 of these bonds, and paid for them 92½ cents on the dollar, and had no notice or knowledge of any illegality. He made this purchase from the contractor L. E. ROBERTS (Record, p. 40). Rollins afterwards sold these bonds to others for value. Rollins was thus a *bona fide* purchaser of said bonds (Record, p. 40), and thus these coupons came into the hands of the purchasers for value, who assigned the coupons now in question to Dudley. The law is well settled that under such circumstances the plaintiff Dudley is a *bona fide* holder for value, and entitled to all rights of a *bona fide* holder.

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser.

McClure vs. Oxford Township,, 94 U. S., 429.

If any previous holder of the bonds in suit was a *bona fide* holder for value, the plaintiff can avail himself of such previous holder's position without showing that he has himself paid value.

Montclair vs. Ramsdell, 107 U. S., 147.

Though he may have notice of infirmities in its origin, a purchaser of a municipal bond from a *bona fide* holder before maturity takes it as free from such infirmities as it was in the hands of such holder.

Douglass County vs. Bolles, 94 U. S., 104.
Marion County vs. Clark, 94 U. S., 278.
Cromwell vs. Sac County, 96 U. S., 51.
San Antonio vs. Mehaffy, 96 U. S., 312.
City of Nauvoo vs. Ritter, 97 U. S., 389.

The foregoing is a complete answer to the argument of the counsel for the county to the effect that the plaintiff Dudley paid no value for the coupons. This fact is immaterial so far as concerns the question whether he is entitled to the rights of a *bona fide* holder for value. It is enough that his predecessors in title paid value, and that the coupons have been assigned to him by a valid assignment.

III.

The Circuit Court had jurisdiction of this action under the Federal statutes.

In his brief in support of the petition for writ of *certiorari* the counsel for the county undertook to question the title of the plaintiff Dudley to sue as a

bona fide holder of these coupons, on the ground that Dudley himself had paid no value; and that, on this ground, the action of the Circuit Court in directing a verdict for the defendant was right; and the judgment of the Circuit Court of Appeals was wrong. But, as we have seen, the fact that Dudley himself paid no value is immaterial, as it was proved on the trial that his predecessors in title paid value, and that qualified him to sue as a *bona fide* holder of these coupons.

The fact that one or two of the purchasers of these bonds and the assignors to the plaintiff of these coupons was a resident of Colorado does not make him any the less a *bona fide* holder of such coupons. Inasmuch as these coupons were commercial paper, Dudley, as the assignee of these, could sue thereon, although his assignors could not, these being within the express exception of the statute which restricts assignees of choses in action generally from suing in the Federal courts unless their assignors could sue therein. But even if the fact were otherwise as to the coupons assigned by the residents of Colorado, yet as to the coupons assigned by the savings banks and others, non-residents of Colorado, the plaintiff would clearly have a right to sue because his assignors would have had a right.

We are aware of the decisions of this court, to which counsel for the county calls attention, under the act of Congress of March 3, 1875, which provides that:

"If it shall appear to the satisfaction of the Circuit Court at any time after suit has been brought that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either

as complainants or defendants, for the purpose of creating a case cognizable under the act, the Circuit Court shall proceed no further therein, but shall dismiss the suit."

The first and most obvious answer to this proposition of the learned counsel for the county as to the provisions of the said act of March 3, 1875, and the decisions thereunder, is that **no such question arises on the record in the present case.** The Circuit Court did not make any ruling on this point. It did not take any testimony or grant any hearing on the question whether the suit was improperly or collusively made; nor did it attempt to dismiss the suit for any such reason; nor was it asked to dismiss the suit for such reason—namely, for the want of jurisdiction. Therefore, no question of this kind entered into the case before the Circuit Court of Appeals, nor is it in the case in this court. On the contrary, the Circuit Court entertained jurisdiction, heard the case on the merits and directed a verdict in favor of the defendant. Even if it were conceded that the suit was improperly or collusively made, then the remedy would be, not to have a judgment on the merits as an adjudication and an estoppel in favor of the defendants, but to dismiss the suit altogether for want of jurisdiction. If this be so, then the judgment of the Circuit Court was wrong and should be reversed. In this event, a suit on these coupons could still be maintained in the Federal court. Mr. Dudley could bring this suit in the name of his assignors, the New Hampshire savings banks and the residents of Connecticut; but, under the Federal statutes, it is per-

fectly clear that he need not do this, but he can sue in his own name.

The learned counsel for the county is evidently confusing two distinct things: One, the rights on general principles of law of a *bona fide* holder of negotiable paper to sue as a *bona fide* holder by reason of the fact that a predecessor in title paid value. That is one thing; and, as we have shown above, there is no doubt of the rights of Dudley as the holder of these coupons to sue as a *bona fide* holder on the facts proved and under the authorities above quoted. Another question is whether under the act of March 3, 1875, the parties have attempted to make a case in the Federal courts of which the Federal courts have no jurisdiction. In the present case there was not a particle of evidence of any such thing. On the contrary, there was ample evidence in the record to show that the plaintiff is a resident of the State of New Hampshire; that he had received assignments of the coupons in question from certain savings banks in the State of New Hampshire and certain residents of the State of Connecticut, and these coupons were many times sufficient in amount to establish and maintain the jurisdiction of the Federal courts on the ground of diverse citizenship of the parties to the suit. The facts as to the non-residence of these assignors was not in the least disputed, nor was any attempt made to dispute them. The mere fact that there were also brought into the suit a few coupons held by two residents of the State of Colorado does not in any manner show that there was any attempt to impose upon the jurisdiction of the Federal courts. The Federal court had jurisdiction without these Colorado coupons being brought in. Therefore, the fact which the learned counsel for the county seeks to main-

tain—namely, that this suit was an attempt to bring into the Federal courts a suit of which the Federal court does not properly have cognizance—wholly fails. There is no ground on which the learned counsel for the county can base such a proposition. The counsel for the county, therefore, fails to defeat either of these propositions; namely: (1) The proposition that the plaintiff is a *bona fide* holder for value according to the general principles of law; and (2) the proposition that the plaintiff is entitled to bring this suit in the Federal court.

As to the coupons which were assigned to the plaintiff by the residents of Colorado, the plaintiff is clearly entitled to sue on these as well as on the others involved in the action, for the reason (1) that he is, on general principles of law, a *bona fide* holder of the said coupons, his predecessors in title having been *bona fide* holders of the same; and (2) for the reason that the statute which generally restricts the right of assignees to sue in the Federal courts especially excepts the case of negotiable paper. Even if it were the fact that such exception would not apply in the case of a collusive transfer merely for the sake of making a case in the Federal court, yet the record and the evidence in the present case wholly negative any suggestion of the counsel for the county that the plaintiff has attempted to make any such collusive case.

IV.

Inasmuch as the bonds contain the recital that they are issued "under and by virtue of and in compliance with an act of the General Assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond," and inasmuch as Section 21 of the said Act of March 24, 1877, which authorizes the issue of these bonds, contains the same limitation on debt voted by the people of the county as is contained in Section 6 of Article XI. of the State Constitution, such recital in the bonds is conclusive in favor of the bona fide holder that the debt limit prescribed by the statute and by the constitution has not been exceeded.

The statute under which these bonds are issued—namely, the act of March 24, 1877—expressly provides, among other things, as follows:

"*Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five million of dollars, $6 on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five

millions, and exceed one million of dollars, $12 on each thousand dollars thereof."

Section 22 of the said act expressly provides, among other things, as follows:

"The county commissioners, when authorized as provided in section 21 of this act, shall make and issue coupon bonds of the county *not exceeding the amount specified in the preceding section* in counties which shall have an assessed property valuation exceeding one million of dollars."

Section 6 of Article XI. of the Colorado State Constitution, as it stood prior to the amendment of 1888, was as follows (General Statutes, Colorado, 1883, p. 62):

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed $5,000,000, $1.50 on each thousand thereof; counties in which such valuation shall be less than $5,000,000, $3 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: *Provided, That this section shall not apply to counties having a valuation of less than $1,000,000.*"

The holder of these bonds, examining them on their face, and examining the assessment rolls of the county for the last assessment prior to the time when the bonds were issued, could not have ascertained that there was an over-issue. The bond recites that it is one of a series of $50,000.

The assessed valuation of taxable property in said County of Lake for the year 1879 was $3,485,628, and for the year 1880 (which is the valuation applicable to these bonds which were issued after September 6, 1880) was $11,124,489, and such assessment was completed on the first day of September in each of said years by the action of the Board of Equalization (Record, p. 47).

Six dollars on the $1,000 on the valuation of 1880 would be $66,746.93. Therefore, the $50,000 issue recited in the bonds would be within the limit prescribed both by the statute and by the constitution.

The bonds in question were not issued until after September 6, 1880, and could not have been before that time, for that is the date of the meeting of the county commissioners at which the bonds were ordered to be issued (Record, p. 91). The bonds were, of course, not bonds at all until delivered. Under the ordinary principles of commercial law the bonds did not constitute an indebtedness until they were delivered, which was after September 6, 1880.

The fact that the vote of the people was had October 7, 1879, and that on the assessment for 1879, $3,485,628 (Record, p. 47), the $50,000 would have made a debt in excess of the limit prescribed by the statute and by the constitution is immaterial so long as the amount of the bonds actually issued and the debt actually incurred by their issue did not exceed the $6

on the $1,000 of the assessed valuation, as the assessed valuation existed at the time the bonds were delivered and the indebtedness actually incurred thereby.

This proposition has been decided by this court in the case of *Marcy vs. Township of Oswego*, 92 U. S., 97. It was held in that case in the Circuit Court by Mr. Justice MILLER that because the township had *voted* to issue more bonds than it lawfully could under the statute the whole series thus voted are void; but the Supreme Court of the United States reversed this ruling, and held the bonds valid, at least in the hands of *bona fide* holders. A similar case arose in the Supreme Court of Kansas and was decided in *Turner vs. Commissioners of Woodson County*, 27 Kans., 314 (1882). The portion of the act there in question was a part of the first proviso to Section 1, to wit: "No township shall be allowed to issue more than $15,000 and five per cent. additional of the assessed value of the property of such township." The action was to restrain the issue of $27,000 of bonds of Center Township in Woodson County to the St. Louis, Fort Scott and Wichita Railroad Company. The facts in the case are stated by Mr. Justice BREWER as follows:

"Upon a proper petition, the county commissioners ordered an election in said township on the question of subscribing to the stock of said railroad in the sum of $27,000, and paying therefor in township bonds. The vote was duly had, and a majority voted in favor of the subscription. All the proceedings were legal and regular, except as hereinafter stated. At the time of the vote the last completed assessment of the taxable property of said township was $215,602. This was the assessment for the year 1880. Before the commencement of this action, and before the railroad company had acquired any right to any bonds under the vote by the completion of their railroad through the township, and before any attempt on the part of the com-

missioners to issue the bonds, the assessment for 1881 had been completed, and amounted to $227,711. Under the limitations of the statute, the $27,000 voted exceeded the amount which the township might lawfully issue upon the basis of the assessment of 1880 by the sum of $614.45. Upon the basis of the assessment of 1881, the whole $27,000 might lawfully issue. The district court held that the assessment of 1880 controlled and enjoined the issue of $614.45 of these bonds, and refused to enjoin the issue of the remainder, $26,385.55. The railroad company and the county commissioners took no exception to the ruling of the district court, but the plaintiff excepted to the refusal to enjoin the issue of the $26,385.55 and brings the case here for review."

Proceeding to give the opinion of the Court, Mr. Justice BREWER says (p. 316):

"Three propositions are made by counsel for plaintiff: First, it is insisted that the assessment of 1880 controlled, and that, as under it the township had voted to issue more bonds than it legally could, the vote was a nullity, and no power vested in the commissioners to issue any bonds; second, * * * Of these in their order: Assuming that the assessment of 1880 controlled, was the vote authorizing the issue of $27,000 a nullity? We think not. The prohibition in the statute is on the *issue* of the bonds. Its language is: 'No township shall be allowed to issue more than,' etc., so that whatever amount the township may be willing to vote, and whatever amount they may by their vote authorize the commissioners to issue, the statute steps in and prescribes a limit beyond which the commissioners may not go. Reference is made to the case of *Marcy v. The Township of Oswego*, 92 U. S., 637, decided in the first instance in the circuit court by Mr. Justice MILLER, and to the case of *Hurt v. Hamilton*, 25 Kas., 76, in which an opinion is expressed antagonistic to the views of the supreme court of the United States in the case just cited. In the former case Mr. Justice MILLER held that, because the township had voted to issue more bonds than it lawfully could under the statute, the whole series thus voted was void. The Supreme Court of the United States reversed this ruling, and held them all valid, at least in

the hands of *bona fide* holders. But a marked distinction exists between the statute under which the bonds were voted in this case and that under which the bonds in the Oswego case were voted. That statute provided (Laws 1870, ch. 90, sec. 1) ' that the amount of bonds *voted* by any township shall not be above such an amount,' etc. This, as heretofore stated, is : ' No township shall be allowed to *issue* more than,' etc. But even in that case, notwithstanding the amount authorized by the vote was excessive, yet if in fact the authorities had only issued the amount the township might legally issue, it may well be doubted whether in the circuit court the bonds would not have been held valid by Mr. Justice MILLER, and of course there would be no question as to the decision in the supreme court of the United States ; but here the limitation is upon the issue, not upon the vote. However excessive the authority apparently granted by the vote to the commissioners, that authority is good up to the statutory limit. The vote of the township was simply an authorization by a principal to its agent, and the agent may perform the act authorized, except so far as it is restrained by some provision of law. Generally speaking, a grant of excessive authority is good up to the legal limit, and an authorization to do more than can legally be done is void only as to the excess. Hence we conclude that the first and principal objection to the ruling of the district court cannot be sustained."

When, therefore, a purchaser of the bonds in question in the present case examined the debt limit provision of the constitution and of the statute authorizing the bonds, and the assessment roll, and examined the face of the bonds themselves, each one reciting that this bond is one of a series of $50,000, he could not thereby ascertain that the issue of the bonds was in excess of the limit prescribed by the constitution.

On the contrary, the purchaser of these bonds would be solemnly informed and assured by the recitals therein that they are issued " under and by virtue of and in compliance with the act of the General Assem-

bly of the State of Colorado, entitled 'An act concerning counties, county officers and county governments, and repealing laws on these subjects,' approved March 24, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond"—that is to say, that the debt limit prescribed by the statute, which is precisely the same as that prescribed by the Constitution, has not been exceeded. The debt limit prescribed by the Constitution being specifically repeated in sections 21 and 22 of the act of March 24, 1877, recited in the bond as the authority for its issue, and the bond reciting and stating for the assurance of the purchaser that it is issued "under and by virtue of and *in compliance with*" said act, and "that all of the provisions of said act have been fully complied with," and furthermore reciting a vote of the people specifically authorizing this very issue of bonds, it is manifest that these recitals mean to assure the purchaser, among other things, that the debt limit of the Constitution, a fact peculiarly within the knowledge of the County, has not been exceeded, and they are false if the contrary is the fact.

The position above taken was held in this case by the United States Circuit Court of Appeals. The Court says (Record, p. 148):

"Such purchaser was therefore entitled to rely on the recitals in the bonds. And, as one of these recitals was a certificate that all the provisions of the act had been fully complied with by the proper officers in the issuing of the bonds, and as a provision of that act limiting the issue of the bonds by the aggregate of all the indebtedness of the county was in effect identical with the constitutional provision on the same subject, the recital was equivalent to a certificate that this provision of the constitution had been complied with, and

brings the case within the decision in *Chaffee County vs. Potter, supra.*"

The same principle is decided by this court in *School District vs. Stone,* 106 U. S., 183, where this Court said:

"Had the bonds recited that they were issued by authority of the election of July 31, 1869, and in *conformity with the provisions of* the statute referred to, there would, in view of the decisions of this Court, be more force in the argument in behalf of the defendant in error. * * * And we should, then, be obliged to decide whether, in view of the constitutional provision, a false recital by the School Board as to the value of the taxable property would conclude the district as between it and a *bona fide* purchaser for value; for, in such case, **since the statute itself contains, substantially, the same limitation upon indebtedness by independent school districts as is prescribed by the State Constitution for county or other political or municipal corporations, a distinct recital that the bonds were issued in conformity with the statute would fairly import a compliance with the Constitution.**"

In *Buchanan vs. Litchfield,* 102 U. S., 278, the bonds there in question recited: "This bond is issued under authority of an act * * * and in pursuance of an ordinance." This court said, Mr. Justice HARLAN giving the opinion (p. 292):

"Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or **had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or**

statement as to the extent of its existing indebtedness."

In *Commissioners, etc., vs. Bolles*, 94 U. S., 104, the Court said:

"The recitals we have now before us are that the bonds were executed and issued not only by virtue of, *but in accordance with* the acts of the Legislature and in pursuance of and in accordance with the vote of a majority of the qualified electors of the county. They are untrue if the Board had not followed the *directions of the law.*"

In *Marcy vs. Township of Oswego*, 92 U. S., 637, the Court said:

"It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The *existence of sufficient taxable property to warrant the amount of the subscription* and issue was no more essential to the exercise of the authority conferred upon the Board of County Commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three-fifths of the legal voters had voted for the subscription." The Court further said: "*The order for the election, then, involved a determination* by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were voters; that the petition was such a one as was contemplated by the law, *and that the amount proposed by it to be subscribed was not beyond the limit fixed by the Legislature.* So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued by virtue of and in compliance with the legislative act and in pursuance of and in accordance with the vote of three-fifths of the legal voters of the township, *was another determination, not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.*"

The recitals in the present Lake County bonds are exactly like the ones in *Marcy vs. Oswego, supra.*

There are many other decisions of the Supreme Court in principle the same, among which may be mentioned *Knox County vs. Aspinwall*, 21 How., 539; *St. Joseph Township vs. Rogers*, 16 Wall, 644; *Town of Coloma vs. Eaves*, 92 U. S., 484; *Converse vs. City of Fort Scott*, 92 U. S., 503; *Town of Concord vs. Portsmouth Savings Bank*, 92 U. S., 625; *County of Moultrie vs. Rockingham, etc.*, 92 U. S., 631; *Humboldt Township vs. Long*, 92 U. S., 642; *Wilson vs. Salamanca*, 99 U. S., 499; *Orleans vs. Pratt*, 99 U. S., 677; *Lyons vs. Munson*, 99 U. S., 684; *Insurance Co. vs. Bruce*, 105 U. S., 328; *Montclair vs. Randell*, 107 U. S., 147; *Sherman County vs. Simmons*, 109 U. S., 735; *Bernard Township vs. Stebbins*, 109 U. S., 341; *Northern Bank vs. Porter Township*, 110 U. S., 608; *Dallas County vs. McKensie*, 110 U. S., 686; *Carroll County vs. Smith*, 111 U. S., 556; *Dixon County vs. Field*, 111 U. S., 83; *New Providence vs. Halsey*, 117 U. S., 336; *Oregon vs. Jennings*, 119 U. S., 74; *German Bank vs. Franklin County*, 128 U. S., 526; *Lake County vs. Graham*, 130 U. S., 675; *Bernard Township vs. Morrison*, 133 U. S., 523; *Chaffee County vs. Potter*, 142 U. S., 355; *Nesbit vs. Riverside Independent District*, 144 U. S., 610; *Sutliff vs. Lake County*, 147 U. S., 230; *Cairo vs. Zane*, 149 U. S., 122; *Hedges vs. Dixon County*, 150 U. S., 182; *Citizens' Savings and Loan Association vs. Perry County*, 156 U. S., 692; *Evansville vs. Dennett*, 161 U. S., 434; *Pana vs. Bowler*, 107 U. S., 529.

If these bonds were issued in full compliance with the act referred to therein (sections 20-25 of which act were printed on the back of each bond), then their issue could not exceed the limitation of county indebtedness prescribed by that act. If their issue did cre-

ate an excessive indebtedness, then the act was violated and the recital was false. There is no possible way to reconcile the recitals in these bonds with the fact of an indebtedness in excess of the limitation of the statute under which they were issued. It is equally clear that the county will not be heard to dispute these recitals as against a *bona fide* holder.

The principle contended for by the County in this case impairs the marketability and value of the bonds and would work great injury to municipalities. The next case cited presents this view with great force.

In *Town of Coloma vs. Eaves*, 92 U. S., 484, the Court said:

"These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered that the higher the price obtained for them, the more advantageous would it be for the company and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the Legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued—contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the Legislature had in view—namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided."

The point that the statute-debt limitation and the constitutional debt limitation are coincident, and that the recital in the bond that it is issued "in full compliance with" the act, &c., was effective as an estoppel

on the county to show that it had a debt in excess of the limit prescribed in the statute, was not made or decided in the case of *Sutliff vs. Lake Co. Commissioners*, 147 U. S., 230, nor was any such point discussed in the opinion, nor were the authorities which we cite below on the point referred to. For these reasons, therefore, the case of *Sutliff vs. Lake Co. Commissioners* is not a precedent to govern the case at bar.

This recital, therefore, in these bonds, that the bonds are issued "*in compliance with an act*," and that "*all the provisions of said act have been fully complied with*," is, therefore, in view of the fact that the statute prescribes precisely the same debt limit as the constitution in the case of the issue of bonds by vote of the people, to be given precisely the same effect as are the recital in the bonds in the case of *Chaffee County vs. Potter*, 142 U. S., 355, "That the total amount of this issue does not exceed the limit prescribed by the constitution of the State of Colorado," which recital in that case was held good and conclusive in favor of the *bona fide* holder.

V.

In the brief in the case of the Board of County Commissioners of the County of Gunnison vs. E. H. Rollins & Sons, No. 178, which case is set for argument at the same time as the present case, we have stated and shown at length (Brief in the Gunnison case,

pp. 38–50) **that the county officers have power to make such recitals as respects a constitutional debt limitation as well as respects the statutory debt limitation. On this point we respectfully refer the court to the arguments in the said brief at the pages above mentioned.**

VI.

The Circuit Court of Appeals properly held that the bonds in controversy did not create a debt by loan in any one year greater than that allowed by the constitution of Colorado.

The negative of this proposition is maintained by the learned counsel for the county, and constitutes the second point in his brief (pp. 35–39), where the constitutional provision is quoted. This objection to the bonds, although not raised by the answer, is fully considered and discussed by the Circuit Court of Appeals in the third division of its opinion (Record, pp. 149–151). It is on this point alone that Judge THAYER dissents, apparently agreeing with the court in every other respect. We find on reading the brief of the learned counsel on the other side in this court on this subject that the argument made in behalf of the county on this point has been so fully answered, and to our minds so satisfactorily anticipated and met by the opinion of the Circuit Court of Appeals, delivered by

Judge LOCHREN and concurred in by Judge SANBORN, that we here reproduce it at length.

" 3. A question not suggested by the answer in the case remains to be considered. The first part of Sec. 6, of Article XI., of the Constitution of Colorado, above quoted, as applicable to the class of counties having an assessed valuation of taxable property exceeding five millions of dollars, in the absence of any vote of the qualified electors, restricts the amount of debt by loan which the county can be allowed to contract in any one year, to $1.50 on each thousand of such assessed valuation. It is questioned whether this limitation upon the amount of debt by loan which the county may be allowed to contract in any one year, does not continue, even after authority has been given by vote of the qualified electors, to create an aggregate indebtedness to the extent, it may be, of six dollars on each thousand of such assessed valuation.

" The contention that the restriction referred to, respecting the amount of debt by loan which a county may be allowed to contract in any one year, without such vote, continues after the changed condition effected by such vote, appears to rest upon what seems to us to be a misconception of a sentence in the opinion in *Lake County vs. Rollins*, 130 U. S., 662, 669. Under the stipulation in that case (p. 664), the only question in the case was whether the limitations contained in Sec. 6 of Article XI. aforesaid were restrictive only of the power of counties to create debts by loan, or restricted further the power to create and incur all forms of indebtedness; it being admitted by the stipulation, that if the general limitations expressed in that section covered all forms of indebtedness, and were not confined to debts by loan exclusively, the defendant in that action was entitled to judgment. Mr. Justice LAMAR pointed out that the first clause of the section, down to where the subject of aggregate indebtedness is considered, speaks only of debts by loan. He then added " Here the matter of indebtedness by loan is completed, and the section passes to a broader subject." In view of the exact question then under consideration, this language means that at the point of the section indicated, the matter of debt by loan exclusively, is completed, and that thenceforward the section passes to a broader subject, embracing all other forms of indebtedness as well as debt by loan. It is

obvious that every sentence of the entire section may enlarge, limit or in some way qualify, the power to contract debts by loan. The provision in respect to submitting the question of incurring indebtedness to the qualified electors, contemplates the submitting of specific propositions, and if the vote is in favor of incurring the debt, the provision that if bonds are issued they shall run not less than ten years, necessarily provides that such debt when so authorized, may be created by loan.

"The case of *The People vs. May*, 9 Colo., 80, does not touch the question of how much indebtedness by loan may be contracted by a county in any one year, after authority has been given by a majority vote of the qualified electors to contract the indebtedness. In that case, as in the Rollins case, the sole question considered arose upon the contention that the Constitutional restriction contained in said Section 6, as to the aggregate amount of county indebtedness, should be regarded only as a limitation of county indebtedness by loan. The Court held, as in the Rollins case, that the general limitations as to aggregate indebtedness, embraced all forms of county indebtedness.

"The provisions of Sec. 6 aforesaid divide themselves into two general clauses, distinct from each other, and each applicable to a condition differing from that to which the other is applicable. The first clause, extending down to the preposition 'unless,' prescribes the restrictions and limitations in respect to the power of contracting indebtedness by counties where there has been no vote of the qualified electors authorizing the creation of specific indebtedness, and not only limits the aggregate amount of indebtedness that can be incurred for all purposes, and in all forms, but also limits the amount of indebtedness by loan that can be created in any one year. The second clause following the preposition 'unless' provides for a changed and different condition, in which a county, by vote of a majority of its qualified electors, upon a proposition submitted to them at a general election, has been authorized to create a specific indebtedness. In that case a single and different limitation is prescribed, namely, that that aggregate debt of the county shall not be made to exceed twice the amount limited in the other case, and a provision (contemplating debt by loan) that the bonds, if any be issued therefor, shall not run less than ten years. But there is no limi-

tation in such case, as to the amount of the indebtedness so authorized which can be created in any one year. It would be singular, indeed, if after authorizing a county, upon vote of its qualified electors, to create a specific indebtedness, for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings, by requiring that the long-time bonds authorized, should only issue and be sold in small annual installments; making the county wait, perhaps a series of years, before getting enough money to warrant it in beginning the erection of the necessary public buildings, and be paying in the meantime interest on the earlier bonds, the proceeds of which would be lying idle, awaiting the accumulation of enough to begin with. Neither the grammatical construction of the section nor any sound reason justifies the importation into the last clause of the section, of the restriction in the first clause as to the amount of debt by loan which can be created in any one year. It may be added, that the legislative construction of this section of the Constitution, as shown by Sec. 21 of the act of March 24, 1877, under which these bonds were issued, conforms to the views here expressed, and that the Supreme Court, in *Sutliff vs. Lake County*, 147 U. S., 230, 234, refers to this statute as being, in respect to limitations, in conformity with the Constitution."

The reason why the views of the learned counsel for the county that the limitation of debts by loan in the first part of section 6, Article XI., of the constitution, cannot be enlarged by the vote provided for in the latter part of the section is shown to be unreasonable and unsound by the following considerations:

1. The fundamental proposition on the other side is that the amount specified in the first part of section 6 cannot be enlarged by a vote, whereas the true and only purpose of the provisions for a vote was that if a favorable vote was had an enlarged amount could be issued. That is the function of the vote. The learned counsel for the county is in the untenable position of suggesting: "Yes; you can create a debt to the extent

of a mill and a half without a vote, but you cannot create a debt for this purpose in any greater amount with a vote." That is the proposition on the other side. That nullifies, emasculates and sets at naught the provisions of the constitution providing for a vote. Why have a vote if you can do everything without the vote that you can do with it?

2. The constitution expressly provides for the issue of bonds for the larger amount whenever a vote is had. The language of Section 6 of Article XI. of the constitution in this respect is as follows:

"And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: Provided, That this section shall not apply to counties having a valuation of less than $1,000,000."

Note the language: "And a majority of voters voting thereon shall vote in favor of incurring **the debt,** but the **bonds,** if any be issued **therefor,**" &c. This language clearly means that bonds may be issued for "**the debt**" so voted, and for **all** "**the debt**" so voted, subject to the limit which is then expressly provided: "But the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of "**debt so contracted**" [that is, contracted by virtue of the vote authorizing the issue of

the bonds] shall not exceed twice the rate upon the valuation last herein mentioned." This is a specific provision that where such vote is had "**bonds**" may be issued "**therefor,**" provided the aggregate amount of the debt shall not exceed at any time six dollars on the thousand. It is inconsistent with the proposition of the counsel for the county that bonds can be issued for only $1.50 in the thousand (which may be done without a vote); for, if this proposition is true, the power to issue bonds is not determined by the vote of the people within the limit proposed—namely, twice the rate—and nullifies the language of the constitution that bonds may be issued for the amount voted, provided that amount be within the limit of twice the rate expressed in the same sentence of the constitution. These considerations are so well presented and elaborated in the opinion of Judge LOCHREN that we need not say anything more on this point.

3. The contention of the learned counsel for the county also nullifies the language of the constitution which says: "And the aggregate amount of indebtedness of any county for *all* purposes," &c. The counsel for the county would make these words read: "And the aggregate amount of indebtedness of any county for all purposes, *except for public buildings, roads and bridges;*" whereas, the view which was taken by the Circuit Court of Appeals, and which we here maintain, is that the last half of section 6 of Article XI. of the constitution applies as well in the case of incurring indebtedness for public buildings, roads and bridges as in the case of incurring indebtedness for any and all other purposes. The language of the constitution is: "For *all* purposes," and it means what it says, and it is utterly inadmissible to

insert by judicial construction into this language, "All purposes, *except those for public buildings, roads and bridges.*" This court decided in the case of *Lake County vs. Rollins*, 130 U. S., 662, and in the case of *Lake County vs. Graham*, 130 U. S., 674, that the words "all purposes" could not be cut down so as to exclude indebtedness for ordinary county expenses. For the same reason we say that they cannot be cut down so as to exclude indebtedness for public buildings, roads and bridges represented by "bonds" issued "therefor." The learned counsel for the county is mistaken in maintaining in his brief (p. 25) that the case of *Lake County vs. Graham*, 130 U. S., 674, supports his contention. On the contrary, as just stated, it defeats that contention.

The question in the *Lake County case* was the single question whether the constitutional limit embraced debts created by a county for ordinary county purposes in the usual course of administration as well as debts created by loan. This was the single question which was argued and discussed in that case; for it was stipulated that, if it did so embrace such county indebtedness, the county indebtedness was, as a matter of fact, beyond the limit. Mr. Justice LAMAR'S language must of course be construed with reference to this point with which he was dealing. Therefore, when he says, "Here the matter of indebtedness by loan is completed, and the section passes to a broader subject," he means just what he says—that here the matter of indebtedness by loan, *exclusively and without a vote of the people*, is completed, and the section passes to a broader subject, dealing with the subject of county indebtedness for "*all purposes*," and providing that on a vote of the people the limits may be enlarged to the

extent specified in the section. His language did not deal or attempt to deal with, or in any way refer to, the question of what indebtedness might be created by a vote of the people.

4. As well pointed out by the Court of Appeals (Record, p. 150), this was the construction adopted by the legislature of the State of Colorado immediately after the adoption of the constitution of the state, when, March 24, 1877, the legislature passed the act authorizing the issue of the bonds in question. In section 21 of that act the proviso is as follows :

> " Provided, that the aggregate amount of indebtedness of any country exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit : Counties in which the assessed valuation of property shall exceed five million of dollars, $6 on each thousand dollars thereof ; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, $12 on each thousand dollars thereof."

This statute, in the view here stated, contains precisely the same limitation upon the indebtedness as that provided in Section 6 of Article XI. of the State constitution as respects the incurring of indebtedness for public buildings when voted upon by the people. This legislative enactment, passed immediately after the adoption of the constitution, and with full knowledge of the purpose of the constitutional provision, would have great weight if the meaning of the constitution were otherwise obscure or ambiguous, which it is not. In the view which we here present, this proviso of section 21 of the act of March 24, 1877, is constitutional and valid ; whereas, in the view adopted by the learned counsel for the county, the proviso is un-

constitutional and invalid. This matter was, in the opinion of this court, in the case of *Sutliff vs. Lake County*, 147 U. S., 230, 234, where Mr. Justice GRAY refers to this very statute as being in respect of limitations in exact conformity with the constitution.

The learned counsel for the county clings with great tenacity to his proposition as to debt by loan, and seeks on this ground to bring this case within the decisions of this Court in *Dixon County vs. Field*, 111 U. S., 88, 90, and *Hedges vs. Dixon County*, 150 U. S., 182, on which he relies, to wit: He says that the bondholder must at his peril take notice of the assessed valuation for the year in which these bonds were issued, which was $11,124,489. At six mills on the dollar this would allow, as above shown, an indebtedness, "exclusive of debts contracted before the adoption of the constitution," of $66,746.93. The assessed valuation on September 1, 1880, was $11,-124,489. The bonds were not issued until after September 6, 1880 (Record, p. 91). The counsel claims that, notwithstanding the vote, no bonds could be issued in any one year in excess of $1.50 in the thousand, which would be $16,686.72. Then he says: "Lay the bond which recites an issue of $50,000 beside the assessed valuation, and it shows on its face that the $50,000 is in excess of the constitutional limitation; and therefore the bondholder had notice by the bond itself that it was void." We have, however, shown clearly that on this valuation it was allowable by a vote of the people to create a debt of six dollars on the thousand, which is $66,746.93; so that, if you lay the bond reciting an issue of $50,000 alongside the statement of indebtedness which the constitution on the vote of the people allows to be contracted, it is more than $16,000 within the limit, to say nothing about debts "contracted be-

fore the adoption of the constitution," cash in the treasury, or other items which may be deducted or allowed.

Let us consider for a moment the practical effect of the construction which the counsel for the county here seeks to maintain. One view of this was stated by the Circuit Court of Appeals in its opinion above quoted (Record, p. 150), where the court says:

"It would be singular indeed if, after authorizing a county, upon vote of its qualified electors, to create a specific indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings, by requiring that the long-time bonds authorized should only issue and be sold in small annual installments; making the county wait, perhaps a series of years, before getting enough money to warrant it in beginning the erection of the necessary public buildings, and be paying in the mean time interest on the earlier bonds, the proceeds of which would be lying idle, awaiting the accumulation of enough to begin with."

But this is not the only objection to this view. The county might indeed commence the erection of the public building on the driblet of $16,000 for the first year, and spend that amount of money in constructing a foundation and what is necessary to cover it and protect it from the weather, and spend the next driblet the next year, and so on; but what reason exists for any such forced and unnatural construction? According to the view of the counsel for the county, it was right to vote the $50,000; but he maintains that you could only issue a given proportion of this in any one year. If this is not his contention, then he must mean that you must have at least three votes, supposing the valuation is not changed, in order to obtain the requisite amount; and it might chance that, after the first had been spent in constructing the foundation, the

county would be up to the limit by reason of incurring other indebtedness, and so defeat the entire project of obtaining county buildings, or leaving the buildings unfinished and ruinous.

VII.

The semi-annual statements required and provided for by section 30 of the act of March 24, 1877, were never in point of fact recorded in a book kept for that purpose. This stands admitted in the record (p. 64), **and the ruling of the trial court in admitting, either as a substitute therefor, "the county clerk's account book"** (Record, p. 64), **or as evidence of which all the world was bound to take notice, was erroneous, and the plaintiff's exception thereto was well taken, and for this reason alone, if there were no other, the judgment of the trial court was rightly reversed by the Circuit Court of Appeals.**

The express requirement of the said section 30 of the act of March 24, 1877, is, *inter alia*, that the financial statement therein provided for, "In addition to being published as before specified, shall also be entered of record by the clerk of the board of county commissioners *in a book to be kept by him for that purpose only*, which book shall be kept open to the inspection of the public at all times." The plaintiff objected on the trial to the reception of the so-called

financial statements, on the distinct grounds that the statement offered was neither made, nor proved, nor published by the board as section 30 requires. These objections are still relied on ; but we are now discussing the proposition on which the case turned in the Circuit Court of Appeals, namely, that there was no record of these financial statements made (admitting that they were otherwise sufficient) recorded in a book kept for that purpose only. It was admitted in the trial court by the counsel for the county (Record, p. 64) :

" Mr. Bryant : The object is to show that what is known as the record of semi-annual statement book never commenced until some years after this, and that this is the only book which the county kept at that time."

Mr. Newell, the county clerk of Lake county, produced by the defendant, testified that the book offered in evidence is " the county clerk's account book" (Record, p. 63). He also testified with reference to this book, which he calls the county clerk's account book (Record, p. 64) :

" Q. Now, is that the only book kept or that was kept by the county which shows these facts ?
" A. Yes, sir."

Then the following occurred :

" Mr. Bryant : Here is a transcript which we would like to introduce in evidence instead of the original book.
" The Court : Offer your book, and then you may leave the transcript on file.
" Mr. Bryant : We will offer the book, then, showing the condition of the county's finances.
" Plaintiff objected for the reasons last above given; objection overruled, to which ruling of the court the plaintiff by counsel then and there duly excepted."

On cross-examination, Mr. NEWELL, the Clerk, also testified (Record, p. 69):

"Q. This is not the record of the semi-annual statements of the county—that is, the record required under the law; what is that book there as you understand it?

"A. That is the county clerk's account book, as he kept it at that time.

"Q. Account book?

"A. As I understand it. It does not give the semi-annual statements as we give them to-day." * * *

"Q. Well, there is another book in which you record semi-annual statements, is there not?

"A. Yes, sir.

"Q. This is not that book?

"A. This is not such book.

"Mr. BRYANT: We offer the original book [that is, the county clerk's account book], and substitute the copy.

"Mr. JOHNSON: We object to the introduction of this record of the outstanding indebtedness; it is not a semi-annual statement signed by the board of county commissioners, and recorded in a book kept for that purpose, within the intent, purpose and meaning of the statute requiring such a record to be kept; there is no evidence of its record as such.

"Objection overruled. To which ruling of the Court the plaintiff by counsel then and there duly excepted, and exceptions were allowed by the Court.

"Said exhibit was then introduced in evidence and was marked EXHIBIT 9, and was in words and figures as follows:

"Exhibit 9.—Lake County in Account with County Treasurer.—Expenditure (count) to January 1, A. D. 1880.—County Fund."

The said EXHIBIT 9 is set out in full in the Record at pages 70 to 73.

This exhibit shows that it was not made, as section 30 requires, by the board of county commissioners, nor does it show the amount of debt owing by the county, in what it consisted, what payments had been made thereon, the rate of interest, and a detailed account of

the receipts and expenditures for the preceding months, and striking a balance showing the deficit or the balance in the treasury. In the certificate at the end, made by the Clerk and Recorder of the county, it is certified :

" That the within and foregoing is a true and correct copy of the expenditure, accounts and indebtedness of the county of Lake from January 1, 1880, to January 1, 1881, as it appears of record in my office in the county clerk's account book, pages 1 to 5 (inc.)."

The Circuit Court of Appeals held, and we submit properly held, that this was improperly received by the Circuit Court as evidence. On this subject the Circuit Court of Appeals, referring to this point and to the *Sutliff case* as bearing on it, says (Record, p. 148) :

" The theory of that case [*Sutliff case*] is that a purchaser of bonds issued under that act [to wit, the act of March 24, 1877] would have constructive notice of what the record of the semi-annual statement provided for by the act, and which it was his duty to examine, would have shown, had he in fact examined such record. *The fact that such record actually existed was assumed and not questioned in the Sutliff case.* But in this case it is clearly shown that there never were any such semi-annual statements, or record thereof, covering any of the time which could affect the legality of these bonds. As there was no such record in existence as the act required and contemplated, there was no record which a purchaser of these bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued."

Of course, if it be true, as was both conceded and clearly shown, that there was no record made in a book kept for that purpose only such as the act requires, the defense that such a record, if kept, would be constructive notice to all the world, has no place in the case. It is a moot question. If no such record book

existed, this fact cuts up by the roots the defense that there was a record made under section 30 showing that the county had exceeded the constitutional limitation, since there can be no such thing as constructive notice of a record which was not kept, and which had no existence. This was the view taken by the Circuit Court of Appeals, who on this point said (Record, p. 148) :

" But in this case [in the Circuit Court of Appeals] it is clearly shown that *there never were any such semi-annual statements*, or record thereof, covering any of the time which could affect the legality of these bonds. As there was no such record in existence as the act required and contemplated, there was no record which a purchaser of *these* bonds was bound to examine, or which would be constructive notice to him of the aggregate indebtedness of the county when the bonds were issued. *Such purchaser was therefore entitled to rely on the recitals in the bonds.* And as one of these recitals was a certificate that all the provisions of the act had been fully complied with by the proper officers in the issuing of the bonds, and as a provision of that act limiting the issue of the bonds by the aggregate of all the indebtedness of the county was in effect identical with the constitutional provision on the same subject, the recital was equivalent to a certificate that this provision of the Constitution had been complied with, and brings the case within the decision in *Chaffee County v. Potter, supra.*

" It has often been held that in the absence of any statutory public record, a county or municipality may be estopped by similar recitals in bonds, from showing that when the bonds were issued there was an aggregate outstanding indebtedness rendering the issue of bonds illegal."

" *Marcy vs. Oswego*, 92 U. S., 637.
" *Humboldt vs. Long*, 92 U. S., 642, 645.
" *Buchanan vs. Litchfield*, 102 U. S., 278, 292.
" *Sherman vs. Simons*, 109 U. S., 735.
" *Dallas vs. McKenzie*, 110 U. S., 686.
" *Wilson vs. Salamanca*, 99 U. S., 499."

"The debt created by the bonds in this case was incurred, not at the time the Board of Commissioners determined that it was necessary, nor when the qualified voters of the county gave authority to incur it, nor at the date of the bonds, they having been antedated, but at the date, later than September 6, 1880, when the bonds were in fact issued and sold. The bonds recite that the whole issue is $50,000, and this recital was notice to purchasers of the bonds of the creation of an indebtedness of the county to that amount. The asssessed valuation of the taxable property of the County of Lake, according to the assessment which was completed by equalization on September 1, 1880, was $11,124,489. This assessed valuation, in view of the vote authorizing the creation of the indebtedness, would admit of a lawful aggregate of indebtedness of that county, to the extent of upwards of $66,000. So that the recited amount of that issue of bonds was not of itself notice to a purchaser that the lawful aggregate limit of indebtedness had been passed, even if such purchaser was bound to take notice of the assessed valuation of the taxable property of the county, as was held in *Dixon vs. Field*, 111 U. S., 83. As said by the Court in *Chaffee County vs. Potter*, 142 U. S., 355, 363, "The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain, by reference to one of the bonds and the assessment roll, whether the county had exceeded its power, under the Constitution, in the premises."

"The Court therefore erred in overruling the plaintiff's objections to the County Clerk's account book, the Warrant Register and the proof of publication of financial statements. None of this evidence was material, as none of it constituted constructive notice to a *bona fide* purchaser of the bonds."

It therefore follows that the action of the Circuit Court of Appeals, in holding that the reception of this evidence was error, was correct, and its reversal of a judgment wherein the Circuit Court peremptorily directed a verdict for the defendant was correct, material improper evidence having been received. This

alone leads to an affirmance of the judgment of the Circuit Court of Appeals.

VIII.

Other errors in the record justified and required the judgment of reversal. The Circuit Court also erred in admitting in evidence over plaintiff's objection and exception transcripts from the records of Lake County showing the issuance of county warrants, the amount of them from day to day, the numbers of them, &c., beginning October 7, 1879, and ending December 31, 1879, &c. (record, pp. 73, 74).

This evidence was admitted over the plaintiff's objection against the plaintiff, a *bona fide* holder of bonds, reciting that they had been issued under and in full compliance with the act authorizing their issue, on the theory that even such a holder was bound to take notice of the indebtedness of the county as shown by the county warrants, warrant register, &c.

This is an extension of the doctrine of constructive notice beyond what was ever claimed before, and in direct conflict with the many decisions of this court above referred to that the bona fide purchaser of such a bond cannot be required to make such an impracticable inquiry.

See on this point especially the case of *Marcy vs.*

Township of Oswego, above cited (*ante*, p. 25) that the recitals in the case at bar create an estoppel on the county, and see particularly the case of *Evansville vs. Dennett*, 161 U. S., 434, referred to at length in our brief in the case of *Gunnison County vs. E. H. Rollins & Sons*, page 65, in which case it was held that a holder of bonds with recitals substantially similar to those in the present bond was not obliged to notice a resolution duly spread on the records of Evansville specified in the bond by date.

Similar proof was admitted against the plaintiff by the Circuit Court in the case of *County Commissioners of Gunnison vs. E. H. Rollins & Sons, No. 178*, on this docket, and was held by the Circuit Court of Appeals to be incompetent.

THAYER, J., giving the opinion of that court, referring to this class of testimony, says:

"It follows from the views which we have heretofore expressed, that the lists of warrants in question were inadmissible against a *bona fide* purchaser of bonds, to contradict and overcome the recitals which the bonds in controversy contain. A purchaser of such securities for value, in the open market, can neither be expected nor required to examine the warrants issued for the original indebtedness, with a view of ascertaining when the debt was contracted, especially when the bonds contain such explicit representations as the bonds in suit contain. No case, we believe, has ever imposed a burden of that kind upon the bondholder."

Record in that case, p. 1-5.

The recitals in the bonds now in suit against Lake County are just as effectual as an estoppel against a resort to the warrants or warrant register as the more particular recitals in the bonds issued by Gunnison County and referred to by the Court of Appeals. Indeed, the broad claim is made by the counsel for the

county both in the briefs in this case and in the Gunnison County case above referred to, that a *bona fide* purchaser of negotiable municipal bonds is bound, no matter what the recitals in those bonds may be, to take notice of any and all public records of the county of every name, nature or description, and even account books of the county, showing, or tending to show, the indebtedness of the county; and this in the absence of any statute making them constructive notice, and in the face of the recital in the bonds that they are rightfully issued. No wonder the trial court said, when such evidence was offered (Record, p. 62): "This case takes very broad grounds. I will let the Court of Appeals decide that question, and will admit the proof."

We submit, therefore, that, to sustain the contention of the county's counsel, and to hold that the *bona fide* purchaser must take notice of all the books and accounts of the county, such as the register of county warrants, the register of the county treasurer, the account books between the county and its treasurer, would be to overrule a long line of decisions made by this court, and invalidate millions of bonds already issued on the faith of those decisions, and destroy the marketability of such bonds for the future. Besides, a county may have debts resting in contract, and not evidenced by any warrant or registration of warrants, and it does not follow that, by examining the warrant and bond registers of a county, the extent of its indebtedness can be surely ascertained. If this be true, there is no such thing left as negotiability in the sense of the law merchant of any municipal bond, so far as respects debt limit or any other condition annexed to the right to issue the same.

IX.

There was power in the County to issue bonds.

The learned counsel for the county cites a number of decisions of this court where this court has stated in substance that, if there is an *entire want of power* in a municipality to incur an indebtedness, there can be no recital to estop the municipality as respects any indebtedess attempted to be incurred. The proposition which he states is, it is true, well settled, that where there is an entire absence of power (which means that there is no statute which authorizes a municipality *on any state of facts or under any circumstances*) to issue municipal bonds, in such case there can be no recital to estop the municipality. But that is not the present case. Here there was power to issue bonds. The only limitation is a limitation as to the amount. The proposition which he states and the cases referred to by him on that proposition, have absolutely no bearing whatever. It has been many times held by this court that where there is statute authority to issue bonds, but where there is also some limitation or condition attached to their issue (as, for example, by the constitution, that the bonds shall not be issued without a vote of the people) bonds issued without complying with the condition or limitation are, nevertheless, not void *for want of power;* but that in such a case the power to issue exists, and the want of a vote or other failure to comply with conditions or limitations is only available as against holders with notice. When this court in its decisions has spoken of entire want of power in a municipality to issue bonds, it has meant a

case where the legislature has never undertaken to authorize the issue under any circumstances whatever. It is like a case where a court has no jurisdiction to deal with the subject; whereas the present case is like a case where a court has jurisdiction, but where, under the contention of counsel, it has made a wrong decision. There is no more want of power to issue the bonds without a vote of the people having been taken than there is to issue bonds where the debt limit has been exceeded.

It has been many times held by this court in the numerous cases cited in this brief, and in our brief in the *Gunnison case*, that if under the constitution and statutes power is conferred to issue municipal bonds, but a limit is placed upon the amount which may be issued such bonds are good in the hands of *bona fide* holders without notice of the limit having been exceeded wherever it is recited that the bonds are issued "under and pursuant to" the enabling act. It is a misnomer and a solecism to say that in such a case there is a want of power. All of these decisions are directly in the teeth of the proposition of the learned counsel for the county. The learned counsel has undertaken to draw a curious distinction between cases where a debt limit is the defense and other cases where the failure to perform some other condition or limitation has occurred. He says that, if the debt limit is transcended, it is necessarily, and under all circumstances, and against all persons, fatal. He admits that if their conditions are not met the bonds may be good, nevertheless, in the hands of *bona fide* holders. Accordingly, counsel says (Brief, pp. 60, 61):

"We do not believe that there will be any question but what the recital in the bond by the proper county

officers that an election had been held and the debt had been authorized would be binding upon the county; but no legislative provision authorizing a county to incur a debt beyond a limit laid down in the constitution, or any act upon the part of the county officers of the entire State and county government could give validity to a county debt incurred in violation of this constitutional provision."

It is a sufficient answer to this proposition to cite the case of *Chaffee County vs. Potter, supra*, and the numerous other cases referred to in this brief and in the Gunnison county brief.

X.

If the said Financial Statement, Exhibit 9, had been recorded, as required, in a book kept for that purpose only, still the so-called financial statement can not be introduced in evidence as against the bona fide holders of the bonds in question containing such recitals as these bonds contain.

On this proposition we respectfully refer the Court to our brief in case No. 178, *Gunnison County vs. E. H. Rollins & Sons*, Point VI., pp. 60 to 103, inclusive.

XI.

The trial court erred in admitting in evidence the orders and proceedings of the county court authorizing the issue of the

bonds in question as against a bona fide holder of the bonds with the recitals therein contained. "That this bond is issued * * * under and by virtue of and in full conformity with the provisions of the act," &c.

On this point we respectfully refer to our argument in the cases of *Commissioners of Gunnison County vs. E. H. Rollins & Sons*, No. 178, pp. 108 to 111.

XII.

Burden of proof in actions on negotiable bonds.

On this point we respectfully refer to our argument in the case of *Commissioners of Gunnison County vs. E. H. Rollins & Sons*, No. 178, pages 111 to 121.

XIII.

Validation of these bonds by the Constitutional Amendment of 1888.

See on this subject the brief of associate counsel filed herein, which, covering the whole subject, we do not discuss it in this brief.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
EDMUND F. RICHARDSON,
Counsel.

APPENDIX.

I.

Sections 21 to 25 of the statute of Colorado approved March 24, 1877, being all of said statute which makes any provisions as to the issue of such bonds.

"448. SEC. 21. When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required and the object for which such debt is to be created, submit the question to a vote of the people, at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election, and all persons voting on that question shall vote by separate ballot, whereon is placed the words 'for county indebtedness,' or 'against county indebtedness;' such ballots to be deposited in a box provided by the county commissioners for that purpose, and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding; and, if upon canvassing the vote (which shall be canvassed in the same manner as the vote for county officers), it shall appear that a majority of all the votes cast are for county indebtedness, then the county commissioners shall be authorized to contract the debt in the name of the county: *Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property

shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions and exceed one million of dollars, twelve dollars on each thousand dollars thereof.

"449. SEC. 22. The county commissioners, when authorized as provided in section twenty-one of this act, shall make and issue coupon bonds of this county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million of dollars, payable at the pleasure of the county, ten years after the date of their issuance, but absolutely due and payable twenty years after such date, bearing interest at the rate of not exceeding ten per cent. per annum from their date until paid. Said interest payable on the first day of April of each year, and the principal, when due, at the office of the county treasurer of the county; and the county commissioners shall prescribe the form of said bonds and the coupons thereto, and to provide for the annual interest accruing on the bonds they shall levy annually a sufficient tax to fully discharge such interest; and for the ultimate redemption of such bonds they shall levy annually, after ten years from the date of such issuance, such tax upon all taxable property in their county as shall create a yearly fund equal to ten per cent. of the whole amount of such bonds issued; and all taxes for interest on and the redemption of such bonds shall be paid in cash only, and shall be kept by the county treasurer as a special fund to be used in the payment of interest on and redemption of such bonds only; such taxes to be levied and collected as other taxes.

"450. SEC. 23. When it shall appear to the board of county commissioners, upon examination of the books and accounts of the county treasurer, that there are sufficient funds in his hands to the credit of the redemption fund to pay in full the principal and accrued interest of any of such bonds, it shall be the duty of such board immediately to call in and pay as many of such bonds and accrued interest thereon as the funds ascertained to be on hand will liquidate, and said board shall thereupon cancel such redeemed bonds, and all uncancelled interest coupons issued therewith. The bonds shall be called in and paid in the order of their issuance, as nearly as may be practicable, and when it is desired to redeem any of such bonds by said

board, they shall cause to be published for thirty days, in some newspaper at or nearest the county seat of the county, a notice that certain county bonds (specifying the numbers and amounts) will be paid upon presentation, and at the expiration of such thirty days said bonds shall cease to bear interest.

"451. SEC. 24. The bonds issued as heretofore provided shall be signed by the chairman of the board of county commissioners and attested by the clerk of the county and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued and the date of its issuance; but no bond shall be of a less denomination than fifty dollars, and, if issued for a greater amount, then for some multiple of that sum; and the aggregate amount of such bonds issued shall not exceed the sum entered of record by the board of county commissioners, as required in section 21 of this act, and any bond issued in excess of said sum shall be null and void.

"452. SEC. 25. The board of county commissioners shall have the right to sell any of such bonds, but no bond shall be sold unless for cash, and not then at a discount of more than 15 per cent. on its par value. The money arising from the sale of such bonds shall be forthwith used for the objects for which the debt was created, and for no other purpose whatever. When any such bonds or any coupons shall be redeemed, the board of county commissioners shall, in the presence of the clerk of said board or his deputy, cancel such bonds or coupons by writing the word 'canceled' on the face of such bonds or coupons, and said board shall make a record of the proceedings, stating what bonds or coupons were cancelled."

II.

Section 30 and other provisions of the Statute of Colorado Approved March 24, 1877.

[*Session Laws, Colorado, 1877, pp. 218, 227.*]

An act entitled "An act concerning counties, county officers and county government and repealing laws on these subjects," approved March 24, 1877, contained the following provision:

"SEC. 30. It shall be the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such Commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the Court House door, and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the *statement thus made, in addition to being published as before specified, shall also be entered of record* by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

NOTE.—The above section 30 is carried into the General Laws Compilation of 1887 and numbered therein as Section 457 of such Compilation.

We have given an analysis of these provisions of the said act of March 24, 1877, at page 78 of our brief in the case of Gunnison County vs. Rollins, No. 178, to which we call the special attention of this court.

III.

County debt limit provisions of Constitution of Colorado.

Section 6 of Article XI. of the Colorado State Constitution, as it stood prior to the amendment of 1888, was as follows (General Statutes, Colorado, 1883, p. 62):

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following—to wit: Counties in which the assessed valuation of taxable property shall exceed $5,000,000, $1.50 on each thousand thereof; counties in which such valuation shall be less than $5,000,000, $3 on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, *exclusive of debts contracted before the adoption of this Constitution*, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: *Provided, That this*

section shall not apply to counties having a valuation of less than $1,000,000."

Section 6 of Article XI. of the Colorado State Constitution, as amended in A. D. 1888 (Mills' Annotated Statutes, Colorado, 1891, p. 326), is as follows:

"No county shall contract any debt by loan, in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to wit: Counties in which the assessed valuation of taxable property shall exceed $5,000,000, $1.50 on each $1,000 thereof; counties in which such valuation shall be less than $5,000,000, $3 on each $1,000 thereof; and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt, but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned.

"*Provided, that any county in this State which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law, prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness; Provided, The question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those*

voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this State for the issuance of road, bridge and public building bonds, and the bonds authorized at such election shall be issued and provisions made for their redemption in the same manner as provided in said law."

The change made in 1888 consisted in leaving out the old provisos and adding the new ones, the said old and new provisos being quoted above in italic.

No. 177.

Brf. of Parks for Respondent

In the Supreme Court of the United States.

Filed Dec. 14, 1898.

October Term, 1898.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY,
Petitioner,
vs.
HARRY H. DUDLEY,
Respondent.

No. 177.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

(16687.)

Brief and Argument of Daniel E. Parks for Harry H. Dudley, Respondent.

DANIEL E. PARKS,
Attorney for Relator.

The F. C. Reid Printing Co., 1335 Lawrence St., Denver.

In the Supreme Court of the United States.

October Term, 1898.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, *Petitioner,*
vs.
HARRY H. DUDLEY, *Respondent.*

No. 173.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

(16687)

Brief and Argument of Daniel E. Parks for Harry H. Dudley, Respondent.

Concurring in the opening brief made and filed herein on the part of the respondent, I desire, in reply to the brief of defendant in error, to amplify somewhat the following points, viz.:

First: POINT III—Suit by assignee.

Second: POINT VI—Proof of Outstanding Debt, and

Third: POINT VII—Validation of Amendment.

STATEMENT.

The following is the amendment to Section 6 of Article XI of the Constitution of Colorado, under discussion, the whole section as amended being set forth in the opening brief, viz.:

"PROVIDED, That any County in this State which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness, provided the question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this State for the issuance of road, bridge and public building bonds, and the bonds authorized at such election *shall be issued* and provision made for their redemption in the same manner as provided in *said law*."

Section 6, Article XI, Constitution of Colorado (Mills' Ann. Sts., Vol. 1, 326).

And the following is the law effectuating such amendment, which was *in existence* and *full force* at the *very time* the amendment was submitted and adopted, viz.:

"671: Debt for Roads, Bridges, Election, Proceedings, Canvass of Election—Aggregate Amount.

"Sec. 151 (21). When the County Commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required and the object for which such debt is to be created, submit the question to a vote of the people, at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election, and all persons voting on that question shall vote by separate ballot, whereon is placed the words 'For County Indebtedness,' or 'Against County Indebtedness;' such ballots to be deposited in a box provided by the County Commissioners for that purpose, and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding, and if, upon canvassing the vote (which shall be canvassed in the same

manner as the vote for county officers), it shall appear that a majority of all the votes cast are for county indebtedness, then the County Commissioners shall be authorized to contract the debt in the name of the county: *Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1st, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, twelve dollars on each thousand dollars thereof." (Sec. 448 (21), p. 223, G. L.)

"672. County Bonds—Interest—Tax—Amount—Redemption.

"Sec. 152 (22). The County Commissioners, when authorized as provided in section twenty-one of this act, shall make and issue coupon bonds of the county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million of dollars, payable at the pleasure of the county, ten years after the date of their issuance, but absolutely due and payable twenty years after such date, bearing interest at the rate not exceeding ten per cent per annum from their date until paid. Said

interest payable on the first day of April of each year, and the principal, when due, at the office of the County Treasurer of the county; and the County Commissioners shall prescribe the form of said bonds, and the coupons thereto; and to provide for the annual interest accruing on the bonds, they shall levy annually a sufficient tax to fully discharge such interest; and for the ultimate redemption of such bonds they shall levy annually, after ten years from the date of such issuance, such tax upon all taxable property in their county as shall create a yearly fund equal to ten per cent of the whole amount of such bonds issued; and all taxes for interest on, and the redemption of such bonds shall be paid in cash only, and shall be kept by the County Treasurer as a special fund, to be used in the payment of interest on, and redemption of such bonds only; such taxes to be levied and collected as other taxes." (Sec. 449 (22), p. 224, G. L.)

"673. Redemption of Bonds—Notice—Interest—Order of Payment.

"Sec. 153 (23). When it shall appear to the Board of County Commissioners, upon examination of the books and accounts of the County Treasurer, that there are sufficient funds in his hands to the credit of the redemption fund to pay in full the principal and accrued interest of any of such bonds, it shall be the duty of such board immediately to call in and pay as many of such bonds and accrued interest thereon as the funds ascertained to be on

hand will liquidate, and said board shall thereupon cancel such redeemed bonds, and all uncanceled interest coupons issued therewith. The bonds shall be called in and paid in the *order of their issuance*, as nearly as may be practicable, and when it is desired to redeem any of such bonds by said board, they shall cause to be published for thirty days, in some newspaper at or nearest the county seat of the county, a notice that certain county bonds (specifying the number and amounts) will be paid upon presentation, and at the expiration of such thirty days said bonds shall cease to bear interest." (Sec. 450 (23), p. 224, G. L.)

"674. Bonds—Signed—Attest—Denomination—Amount.

"Sec. 154 (24). The bonds issued as heretofore provided, shall be signed by the chairman of the Board of County Commissioners, and attested by the Clerk of the county, and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose, in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance; but no bond shall be of a less denomination than fifty dollars, and, if issued for a greater amount, then for some multiple of that sum; and the aggregate amount of such bonds issued shall not exceed the sum entered of record by the Board of County Commissioners, as required in Section 21

of this act, and any bond issued in excess of said sum shall be null and void. (Sec. 451 (24), p. 225, G. L.)

"675. Selling Bonds—Rate—Redemption—Cancellation—How Funds Used.

"Sec. 155 (25). The Board of County Commissioners shall have the right to sell any of such bonds, but no bond shall be sold unless for cash, and not then at a discount of more than 15 per cent on its par value. The money arising from the sale of such bonds shall be forthwith used for the objects for which the debt was created, and for no other purpose whatever. When any such bonds or any coupons shall be redeemed, the Board of County Commissioners shall, in the presence of the clerk of said board or his deputy, cancel such bonds or coupons by writing the word 'canceled' on the face of such bonds or coupons, and said board shall make a record of the proceedings, stating what bonds or coupons were canceled." (Sec. 452 (25), p. 225, G. L.)

"670. Semi-Annual Statements of Indebtedness by Commissioners—Contents—Notice—Publication—Posted—Recorded.

"Sec. 150 (30). It shall be the duty of the Board of County Commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly

newspaper published in the county, if there be such published; and if there be no newspaper published in the county, such Commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the court house door; and such statement *shall* show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the statement thus made in addition to being published as before specified shall also be entered of record by the clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times." (Sec. 457 (30), pp. 227-8, G. L.)

This statute will be found in the following named books, viz.: General Statutes of Colorado, 1883, Sections 671 to 676, inclusive. General Laws of Colorado, 1877, Sections 448 to 452, and Section 457. Mills' Annotated Statutes of Colorado, Sections 933 to 939. The text of this statute, as above given, is copied *verbatim* as to text and punctua-

tion, from the General Laws of Colorado of 1877, at pages 223 to 225, also 227 and 228. The law as it is given by the laws of 1877 *was* and *is* the law as it existed when the bonds in suit were issued. And this statute was printed upon the back of each of the bonds excepting Section 457, which was not printed. (Record, pages 27 to 29, inclusive.)

I.

There is no force in the position of defendant in error concerning the question of the jurisdiction of the Court below of the subject matter of this litigation, or of the parties to this action. Section 1 of the Act of March 3, 1887 (24 U. S. Stats. at Large, 553), specifically confers such jurisdiction, this action being upon negotiable coupons payable to bearer, cut from the negotiable coupon bonds issued by the defendant in error, a political governmental CORPORATION, under the laws of Colorado (Mills' Anno. Statutes, Colo., Vol. I, Chapter 33, page 744, Section 774, *et seq.* Id., page 727, Section 731, and laws cited), which coupons, as well as the bonds, became the property of the purchaser and holder *absolutely*, by delivery, the title passing *absolutely* and beyond recall, in this case, under the bills of sale in evidence. (Record, pages 35 to 39, inclusive.) The plaintiff in error in this case, therefore, having the legal title to the causes of action herein, by PURCHASE, CONVEYANCE and DELIVERY, his title is not that of an ASSIGNEE, but that of owner and holder of the *integral body* of the secur-

ity itself, by conveyance and delivery thereof, as evidenced in this case. Such a case is within the *exceptions* of Section 1 of the Act of Congress of 1887, as amended in 1888, so far as the Jones and Stanley coupons and bonds are concerned, and this action of the plaintiff in error is maintainable thereon, the Court below having jurisdiction of the parties as well as of the subject matter of the action. Newgass vs. New Orleans, 33 Fed. Rep., 196-199; Rollins vs. Chaffee Co., 34 Id., 91-93; Jerome vs. Commissioners, 18 Id., 873.

The foregoing cases are directly in point as to the construction of the act cited. The following cases are also analogous, being constructions of other similar statutes, but enunciating principles which are applicable to the construction of Section 1 of the Act of March 3, 1887: Perrine vs. Town of Thompson, 17 Blatchford, 10, and cases cited. In that case the Court said: "The evidence would not have authorized the jury to find that the plaintiff's purchase of the coupons in suit was colorable and fictitious merely. Quite likely he bought them *mainly with the object of bringing suit upon them in this Court, and intending, if he collected, to pay over a portion of the recovery to some other person;* and perhaps the jury would have been justified in finding that the coupons *were sold by the owner, as well as bought by the plaintiff, with this understanding.* Nevertheless, *the plaintiff acquired the legal title,* and, this being so, the motive of the transaction is not material." McDonald vs. Smalley, 1 Peters,

620; Smith vs. Kernochen, 7 How., 198, 216. "The plaintiff is not an assignee, but acquired his title by delivery, and the coupons are promissory notes within Section 1 of the Act of March 3, 1875. 18 U. S. Stat. at Large, 470; Cooper vs. Town of Thompson, *supra*, and cases there cited;" Jones vs. League, 18 Howard, 76; Cooper vs. Town of Thompson, 13 Blatchford, 434, and cases cited; Briggs vs. French, 2 Sum., 252; Newby vs. Ogden Central Ry., 1 Sawyer, 63.

The holder of coupons payable to bearer is *not the assignee* of a cause of action. He acquires title by delivery, and the promise to pay the bearer in the coupon is a promise to pay him directly. City of Lexington vs. Butler, 14 Wallace, 283.

In Commissioners vs. Bolles, 94 U. S., 104, the action was upon bonds, a large part of which were "owned by other persons, who deposited them with plaintiff for collection," and the Court said: "They (the holders) can call to their aid the fact that their predecessors in ownership were such (*bona fide*) purchasers. *To the rights of such purchasers they have succeeded.* Certainly the Railroad Company paid for the bonds and coupons by giving an equal amount of stock, which the county now holds." Again it appears from the testimony of witness Wright (record, pages 18 to 25), and that of witness Dudley (record, page 40), that David Craig, J. H. Jagger, Henry D. Holly, L. C. Hubbard, The Nashua Savings Bank and The Union Five Cents Savings Bank, from whom the plaintiff purchased

the greater part of the bonds and coupons in suit, are *not citizens* of the State of Colorado, therefore the Court below had jurisdiction of this action, regardless of the status of the *Stanley* and *Jones* bonds and coupons. But the Court below also had jurisdiction of the action on account of the Jones and Stanley coupons and bonds as well. As stated in the beginning of this point, there is therefore nothing in the contention of the defendant in error concerning the jurisdiction of the Court below as to any of the causes of action in suit. Aside from that, the question was not properly raised by plea in abatement in apt time. The general answer in bar waived the plea in abatement to the jurisdiction involved in the question of ownership.

The whole matter must be covered by a plea in abatement (2 B. & P., 420). Cannot be pleaded after making defense (1 Chitty Pl., 441; 6 Lond. Ed.). Must be pleaded before plea to the merits (6 Met., 224; 11 Cush., 164; 21 Vt., 52; 40 Me., 218; 22 Barbour, 244; 14 Ark., 445; 35 Me., 121; 15 Ala., 675; 19 Conn., 493; 1 Iowa, 165; 4 Gill (Md.), 166.

Defendant, by answering in bar and to the merits, waives plea in abatement (Foster Pl., 228, Note 2, and cases; Livingston vs. Storey, 11 Peters, 351, etc.).

By pleading over in bar, a party waives all pleas in abatement (B. and O.R.R.Co. vs. Harris, 12 Wallace, 65; Cook vs. Burnley, 11 Wallace, 659; Jolly vs. Pryor, 33 N. W. Rep., 889; N. Hudson Co. Ry. vs. Flannagan, 57 N. J. Law, 236).

II.

The evidence comprised in the supposed semi-annual statement offered by defendant, and received in evidence on the trial below (record, pages 93 and 103, inclusive), to prove and establish the outstanding indebtedness of the defendant county, at the time of the issuance of the bonds and coupons in question, was incompetent, and should not have been admitted, for any and all of the reasons stated in the objections made by the plaintiff. (Record, pages 97–99.) The evidence was incompetent, and therefore immaterial, because: 1st, It was not authentic. 2d. It did not *strictly* comply with the statute. 3d. There is no evidence accompanying it showing that the Board of County Commissioners ever made the same, officially or otherwise, or signed and executed it and had it recorded in the office of the County Clerk, as the law requires. 5th. But simply *purports*, without the antecedent proof necessary to authorize its introduction, to be a semi-annual statement. 5th. It purports *only* to be signed by somebody and copied out of some newspaper. 6th. The warrant indebtedness therein enumerated may have all been paid before the issuance of the bonds, and there is no sufficient proof to the contrary. 7th. There is no evidence showing or proving that the supposed original of the supposed copy of the statement was ever entered of record by the clerk of the defendant Board of County Commissioners, in a book kept by him for that purpose only, as re-

quired by Section 457 of the General Laws of Colorado of 1877, in force at that time. 8th. It appears by the evidence of witness Newell (record, pages 63 to 70, inclusive), that no such book or record was kept at the time and that no such record then made was in the office of the Clerk and Recorder of said defendant county, said Clerk and Recorder being *ex-officio* clerk of said defendant board. (Mills' Anno. Stats. of Colo., Vol. 1, Sec. 829.) 9th. The said supposed semi-annual statement is defective in not showing the following matters required by the statutes cited, under which it purports to be issued, viz.: (*a.*) It does not show on its face what payments, if any, had been made upon the supposed debts therein enumerated. (*b.*) Nor the rate of interest borne by said supposed debts. (*c.*) Nor what the debts consist of. (*d.*) Nor a detailed account of the receipts and expenditures of the defendant county. (*e.*) Nor does it show from what officer or on what account moneys had been received, if any. (*f.*) Nor does it show the amounts paid on the indebtedness, nor on what accounts such moneys have been paid, and the sums. (*g.*) Nor does it show the amount of deficit, or balance, in the treasury, nor anything upon that subject. (*h.*) Nor does the said supposed statement purport to give, nor does it show, a detailed account of the receipts and expenditures of said defendant county, for the preceding six months. (*i.*) Nor state the time when the receipts and expenditures dealt with were had and

made. 10th. The proof of publication of the said supposed copy of the supposed original statement is insufficient and inadmissible, for the reason that it does not show the proof made, if any was made, at *the time* of the supposed publication of the original statement. 11th. There was no evidence that proof of publication was ever made at the time of such publication, or upon the supposed original, as required by law or otherwise. If so, such proof would necessarily bear date as of the time of publication, whereas, the proof of publication attached to the supposed copy of the supposed statement was made December 16, A. D. 1893, more than 13 years after the date of such statement and its supposed publication. 12th. The affidavit of C. C. Davis, attached to the supposed statement, is therefore incompetent, and cannot be received to prove such publication in place of the *original* evidence of publication required by law, which would be recorded with the record of the statement, if such record was ever made. 13th. The said supposed copy of the said supposed original statement shows on its face it was not and could not be a copy of the supposed original, for the reason that the original proof of publication annexed to the original statement would of necessity bear date as of the date or near the date of the publication of the original. 14th. The original itself would be inadmissible as evidence without proof of publication attached thereto, and such original may not be evidenced

by copy, unless in due time and form, made, published and filed, with proof of publication attached, with the clerk of the defendant Board of County Commissioners, and by him recorded in a book kept by him for that purpose, as required by said section of said law cited. 15th. Without competent proof of publication, the said supposed copy statement, or its supposed original, could not be admitted as evidence of the supposed facts which they contain. 16th. There is no proof whatever of the existence of the supposed original of the supposed copy of the statement, or that it was made and executed by any or either of the officers who purport to have executed the same. 17th. For aught that appears in the evidence adduced on the trial, the supposed original was never made or executed, by any authority whatever. And there is no evidence that the county board, as a board, made up the supposed statement.

The said supposed semi-annual statement purports to be a statement of the debt outstanding on January 1, 1880, seven months prior to the date of the issuance of the bonds in question. The statement of June 30, 1880, provided for by the law cited, is the only evidence under the statute, of the outstanding debt, which could measure the power to issue the bonds in question, and that was not offered as evidence.

The foregoing points, contained in the objections made on the trial, to the receipt in evidence of the said supposed semi-annual statement (record,

pages 97–99) are relied upon by the respondent to affirm the judgment below, and I now re-state them, as arguments before this Court, showing the *signal error* of the trial Court in admitting said statement in evidence. In my judgment, no more flagrant example of the disregard of the rules of evidence, governing the trial of cases in a Court of original jurisdiction, is to be found. It seems to me that each of the several points above made conclusively urge their own correctness by their bare statement, without occupying the time of this Court in the citation of authorities upholding the same. The statute is the rule of action and enforces its own language as such. It is all sufficiently plain.

That the semi-annual statement required by the law cited to be made and recorded on July 1, 1880, was and is the only statement to be taken into account under the statute, as the one affording the rule for determining the power of the county, in issuing the bonds in question, requires no argument for numerous reasons, which will occur to the minds of this Court; such being the *last* statement provided for by the law cited, prior to the issuance of the bonds, could *only* afford the information to the bondholder, required by law. The purchaser of the bonds was required to look no further.

If the law of semi-annual statements of Colorado counties cited, under which the said supposed statement is supposed to have been made, was and is designed to change the rule of evidence afforded

by the common law relative to the proof of the outstanding indebtedness of the counties of Colorado, to the extent of bringing the evidence thereof home to the knowledge of persons dealing with such counties, such statute is in derogation, and against the course, of the common law, and consequently must be *strictly construed.*

Endlich on Statutes, Sections 127 and 128, and cases cited. Especially those cited in note 88, page 174. That author says: "But, in this country, the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed." And in Section 128, the same author says: "To the class of statutes falling under this rule belong those changing rules of evidence, permitting persons to be witnesses in their own cases." Sutherland, in his work on the Construction of Statutes, Section 290, says: "It is not supposed that the Legislature intended to make any invasion upon the common law, further than the necessity of the case require. In other words, statutes in derogation of it, and especially of a common law right, are strictly construed." In Warner vs. Fowler, 8 Md. Repts., 25-30, the Court said: "Waiving all question as to the alleged generality, under the act of 1825, ch. 117, of the several prayers to be found in the record, we are of opinion that the instruction actually given by the Judge of the Circuit Court was substantially correct. The act of assembly under which the affirmation was

made, is one, in *this particular*, in *derogation* of the course of the common law, and like all such legislation, is to be construed *strictly*. See Dyson vs. West's Exe'r., 1 Har. & John., 567. According to the principles of the common law, a party is denied the right of being a witness in his own case; and under our act of assembly, he is only allowed the privilege if his account does '*not exceed ten pounds, current money, in the course of any whole year,' and if it 'be proved within twelve months after the first article therein charged shall become due, and not otherwise.*' The account in this case ought, in our judgment, to show *affirmatively* on its *face* a compliance with the requisitions of the act of assembly. This not being so, there was no right in the party to make the affirmation, and as a consequence, it was *extra-judicial*." See also Brown vs. Barry, 3 Dallas, 365. Turning again to the law of the supposed semi-annual statement cited, and the statement itself, and comparing the statement with the law, it will be seen that the law requires the statement to show the following matters which are omitted therefrom, viz.: "The amount of debt owing by the county." The statement should show the *whole debt*, whereas it only shows the warrant debt, and it appears on the face of the statement that there is a bonded debt, on account of which it shows taxes have been levied to pay the interest. "In what the debts consist." It does not specify the *character* of the debt. "What payments, if any, have been made." This is not shown. "The rate

of interest such debts are drawing." This is omitted. "A detailed account of the receipts and expenditures of the county for the preceding (six) months." This is not shown. The statement deals with the amount of the *tax levy* and not with the *moneys* actually *received;* nor does it show the expenditures definitely. It shows the amount of county warrants canceled, but does not show how or when they were paid; nor whether by cash or in receipt for taxes as authorized by the General Laws, Colo., 1877, pp. 759-60, Sections 2280-2290, and General Stats. of Colo., 1883, Sections 2884 and 2885; nor does the statement show that it relates to the operations of the *preceding six months.* It does not show the *receipt* of any *moneys* whatever, nor from what officers, or on what account they were received, and the amounts, nor to what individuals, nor on what account moneys have been paid out, if any, and the amounts. No balance is struck, showing a deficit, if any, between the receipts and expenditures, that it may be seen what the receipts were, and what the deficit was, if any, or whether or not there *was* a deficit, or an actual balance of moneys in the treasury, if any.

It thus appears *definitely* that the said supposed statement is not *that* contemplated and required by the statute. The statement contemplated by the law is one which states specifically the *moneys* received *in fact* and from whence it came, and the moneys paid out in fact, and to whom. The *whole* debt of the county, and the

deficiency, if any, between the debt itself and the amount collected and paid out, upon such outstanding debt. The statement erroneously deals with the taxes levied, collected, in process of collection and uncollected, instead of with the moneys *actually collected*. The law contemplates an account similar to that usually made out and rendered between natural persons, from which the dealings between the parties can be seen and understood. The statute providing for such statement of account is mandatory. The language is "It *shall be* the duty of the Board of County Commissioners to make," etc., and "such statement *shall show*, the amount of debt owing by the county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a *detailed account* of the *receipts* and *expenditures* of the county for the preceding (six) months, in which *shall be shown* from what officer and on what account any moneys have been received, and the amounts, and to what individuals and on what account any moneys have been paid out, and the amounts; and *shall strike* the balance, showing the *amount of deficit*, if any, and the *balance* in the treasury, if any." The said law also requires the statement to be published or posted in this language: "At *which time* (the time the same is made) they *shall have such statement published* in some weekly newspaper, published in the county, if there be such published; and if there be no newspaper published in the county, such

Commissioners shall cause such statement to be posted in three conspicuous places in said county, one of which shall be the court house door." And the law further provides that the statement shall be recorded in this language: "And the statement thus made, in *addition* to being published, as *before specified, shall also* be *entered* of *record* by the clerk of the Board of County Commissioners, *in a book to be by him kept for that purpose only*, which book shall be open to the inspection of the public at all times." The words of the statute are "SHALL HAVE SUCH STATEMENT PUBLISHED," etc. Such statement shall show, etc. "In which it *shall* be shown from what office," etc., and "the statement *thus made*, in addition to being published, as before specified, *shall* also be entered of record," etc. Here, then, we have clear, mandatory statutory law prescribing the conditions *precedent* to constituting a semi-annual statement, evidence of the matters therein contained. The statement must not only contain all the statute requires, but it must also be published in a weekly newspaper published in the county or posted, as the case may require, *at the time the same is made*, and the statement *thus made* must also be entered of record by the clerk of the board in a book to be by him kept for that purpose only. All these requirements must be STRICTLY complied with and SHOWN TO EXIST to entitle the statement to be received as evidence of the matters set forth therein, and unless strictly complied with, we have seen that the same must be rejected

as evidence. There was NO PROOF or OFFER OF PROOF, on the trial below, that the supposed statement in this case was recorded as the law requires, and if there had been such proof, the record would have been unavailing as evidence, for the reason that the statement does not comply with the mandatory law concerning what it SHALL state and contain. The Court below, therefore, erred signally in admitting it in evidence and in giving judgment in accord with the proof it was supposed and permitted to furnish. The publication of the statement was a condition precedent to its record, the language of the law being, "And the statement thus made." As a matter of law and fact a statement is not a statement until it is made as required by the law, and it is not "thus made" until it is made by proper authority and published or posted as the case may require, and hence until it is "thus made" it may not be recorded as provided and operate as notice or evidence of notice to any one, and if recorded without being "thus made" the record is a nullity, as notice or evidence of notice, and no one is affected thereby. In the case of Sutliff vs. Lake Co., 147 U. S., 234, the Court says: "The statute, moreover, * * * made it their (the Board of Commissioners) duty to *publish*, and to cause to be entered on their records, open to the inspection of the public at all times, semi-annual statements, *exhibiting in detail the debts, expenditures and receipts of the county for the preceding six months*, and striking the balance so as to

show the amount of any deficit, and the balance in the treasury."

Here, this Court, in the case cited, construing the very statute under consideration, holds that the statement MUST CONTAIN THAT WHICH WE CLAIM AND CONTEND FOR.

The statute necessarily makes the semi-annual statement the PRIMARY and ONLY evidence of the debt outstanding and unpaid when the bonds are issued, because it specially provides for the creation of such evidence, and in effect designates it as the only evidence of the debt of the county to be considered with reference to the bonds; such evidence, therefore, necessarily becomes the only evidence available, of the county's debt, on the principle of *expressio unius est exclusio alterius*. The purchaser of the bonds need look no further for evidence of the outstanding debt and need not look *beyond* the statement provided by the statute for the six months immediately preceding the date of the issuance of the bonds. In the case at bar, that statement was for the six months immediately preceding July 1, A. D. 1880. It stands to reason that unless the specific evidence of debt provided by the statute is extant and available, in accordance with the provisions of the statute itself, the purchaser for value of bonds cannot be affected with notice other than that provided by the statute itself, and that to bring the notice home to such purchaser, the statute must be *strictly pursued* in creating the evidence of such notice. Such evidence is exclusive, by virtue of the

statute providing it, and hence the admission of the warrant registry and clerk's books on the trial of this case below, was signal error. In the case of Sutliff vs. Lake County, cited at page 235 of the report, the Court said: "*But if the statute expressly requires those facts to be made a matter of record, open to the inspection of everyone*, there can be *no implication* that it was intended to leave *that matter* to be determined and concluded, *contrary to the facts so recorded.*" And I add, that there can be no implication that it was intended to leave *that matter* to be determined and concluded in any other manner or by any other evidence than that provided by the statute itself, and the record to be made thereunder, and if there is none, or none such as the statute expressly requires to be made (and we have seen there is none if the statute is not strictly pursued), then the fact of the outstanding indebtedness is open, and not determined as required by law, and the purchaser under no obligation to look further, as he is justified in assuming, in the absence of the required record, that no debt exists other than those of the bonds he is dealing with. Thus this Court holds, in effect, in construing the *very statute* under consideration, that the semi-annual statement and record thereof, provided for, was and is the only evidence of the fact of the debt outstanding, which fact, and the notice resulting therefrom, depended entirely upon the statute and the record made thereunder, the Court saying, in view of the statute and its provis-

ions, "there can be no implication that it was intended to leave that matter (the fact of the outstanding debt and assessed valuation) *to be determined and concluded contrary to the facts* SO RECORDED." Or, in other words, contrary to the mode and manner provided by the statute and the *record provided thereby*. This Court, in the same case, at pages 236-37-38 of the report, says, quoting from Dixon County vs. Field: "If the fact necessary to the existence of the authority was *by law* to be ascertained, not officially by the officers charged with the execution of the power, but by *reference to some express and definite record* of a *public character*, then the *true meaning* of the law *would be* that the authority to act at all *depended upon the actual objective existence* of the *requisite fact*, as SHOWN BY THE RECORD, and *not* upon its ascertainment and determination by anyone." That is to say, by any other mode or manner than that provided by the statute. The Court continues:

"The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in *one way only*, and *that* was by reference to the *assessment itself*, a *public record* equally accessible to all intending purchasers of bonds, as well as to the county officers." * * * "All the world besides must have it from the same source, and for themselves." * * * "The fact, *as it is recorded* in the assessment itself, is intrinsic, and proves itself by inspection and concludes all deter-

minations that contradict it." "In Chaffee County vs. Potter, on the other hand, the bonds contained an express recital that the total amount of the issue did not exceed the constitutional limit, and *did not show* on their face the amount of the issue, and the county records showed *only* the valuation of property, so that, as observed by Mr Justice Lamar in delivering judgment: 'the purchaser might even know, indeed, it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and *yet he could not ascertain by reference* to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises.'" The above doctrine applies rigidly to the supposed record of the outstanding indebtedness, in the case at bar, like the assessment, the indebtedness was ascertainable by reference to an *express* and definite record of a public character, and the true meaning of the law would be, that the limitation of power to act depended upon the *actual objective existence* of the requisite fact as *shown only by the record*, which the law provided to that end, and not upon its ascertainment and determination by any other means, mode or manner. If there is no such record, the whole matter is, so far as the purchaser of the bonds is concerned, absolutely at sea, entitled to no recognition and absolutely beyond the scope of judicial cognizance. As said above, in Dixon County vs. Field, of the assessment, so it must be said of the outstanding debt, *ex vi termini*

it was ascertainable in *one way only*, and that was by reference to the semi-annual statement itself and the record thereof, a public record, equally accessible to all intending purchasers of bonds, etc., all the world besides must have it *from the same* source, if at all, and for themselves. The fact as it is recorded in the record of the statement itself is intrinsic, proves itself by inspection, and concludes all determinations that contradict it. But if, as in this case, there is no record, then in the language of this Court in Chaffee County vs. Potter, the purchaser might even know, indeed it may be admitted that he would be required to know the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to a *record* of indebtedness made as required by the statutes, and the assessment roll, whether the county had exceeded its power under the constitution in the premises, *as no such record of indebtedness was in existence*. This Court continues in the principal case cited: "The case at bar does not fall within Chaffee County vs. Potter, and cannot be distinguished in principle from Dixon County vs. Field, or from Lake County vs. Graham. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here *two facts* are to be shown, the valuation of the property, and the *amount of the county debt*. But, as *both these facts* are *equally required* by the *statute* to be *entered on*

public record of the county, they are *both facts* of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds." So here, in the case at bar, if there was such record as to *both* of the required facts. But as to the record of indebtedness, we say *nul tiel record*, and such being the fact, the rule of Chaffee County vs. Potter obtains and governs this case as against all other decisions.

The evidence of the debt outstanding by force of the statute admits of no evidence of a *secondary* character, because such secondary evidence of debt, if any, is *de hors* the statute providing for semi-annual statements and their record, and hence is incompetent to bring home notice, or evidence of notice, to the purchaser of the bonds.

The County Government Act of March 24, 1877, which contains the legislation under consideration, was compiled by the first state general assembly from, and contains the various county laws existing and in force under the territorial regime, and was not intended to speak as a new law, the provisions of which were unknown to the people of Colorado. The act simply collects together in a single enactment and continues, the county legislation which already existed in various acts, enacted at various times, by the territorial Legislature. The law cited, relating to semi-annual statements, existed in 1868 (Revised Statutes of Colorado, of 1868, page 172, Sec. 30), in the following form:

"Section 30. The Boards of Commissioners of their respective counties, at their regular meetings, to be held in January and July in each year, shall cause to be prepared a statement of the receipts and expenditures of such county during the six months immediately preceding, setting forth the amount of money received from taxes, from the licenses for the sale of intoxicating liquors, and from the licenses to sell or peddle other merchandise, respectively, and the amount received from all other sources; setting forth also the amount expended, and the particular objects for which, in each case, every sum of money hath been expended; and such statement, signed by the chairman and clerk of the board, shall be published at least one week in some newspaper printed in the county, or if there be none, by posting in three public places in such county."

And prior to the act of 1877, the act of 1868 was supplanted by the act of 1872 (Laws of 1872, pages 78, 79), which is as follows, viz.:

"Section 1. Hereafter it shall be the duty of the County Commissioners of each county to make out statements at the end of each and every three months of each year, that is, on the first of January, April, July and October, at which times it shall be the duty of such County Commissioners to have such statement published in some weekly newspaper, published in the county, if there be such published; and if there be no newspaper published in the county, then copies of such statement shall be

made out, and shall be posted up in the most conspicuous place in each township of the county, by the Sheriff, within two weeks after the statement shall have been made out."

"Section 2. Such statement shall show the amount of debt owing by their counties; in what the debt consists; what payments, if any, have been made upon the same; the rate of interest that such debts are drawing; also a detailed account of the receipts and expenditures of the county for the preceding three months, in which shall be shown from what officer, and on what account any money has been received, and the amounts; and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount of the deficit, if any, and the balance in the treasury, if any."

"Section 3. The statement thus made, in addition to being published as before specified, shall also be entered of record by the Clerk of the Board of County Commissioners, in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

The last act was substantially continued in that of 1877. This was the law of the territory when there was no congressional limitation upon the power of counties in the contraction of indebtedness, as the "Harrison Act" providing such limitation in territories was not passed until July 30, 1886 (Supplement to R. S. U. S., 503 to 505), long after Colorado became a state. So that the pecul-

iar significance given to 457 of the county government act of 1877, as providing a record of indebtedness, of which the purchasers of Colorado county bonds must take notice, is hardly warranted by the history of the law, for, as is seen, it was not designed to convey notice to purchasers of bonds, under a constitutional or other limitation of power to incur indebtedness. The act of 1877, as before stated, originated no new departure on the subjects embraced in the same, but simply embraced and continued therein the law as it stood *prior* thereto, when Colorado was a territory, and the several counties of the state had power to contract or incur debts co-extensive with the laws passed by the territorial Legislature.

In the foregoing argument I do not mean to be understood as contending that if the sum of the entire issue of the bonds, stated on their face to be $50,000, is in excess of the constitutional limit, the defendant in error could not rely upon the recital of the bonds to show the extent of the issue, and to show that the issue was beyond the constitutional limit if such was the fact. But in this case the following facts appear by the defendant's answer (record, pages 12 and 13), viz.: That the debt limit when the bonds in question were issued, was $66,758.93; and that the assessed valuation of the defendant county for the year 1880 was $11,126,489. It also appears by the final action of the defendant county, had September 6, 1880 (record, pages 91, 95), that the bonds in suit were issued on *that day*,

although dated July 31, 1880, the date of such final action, thus fixing the day of the issuance of the bonds and the contraction of the debt of the same, as against the date of the bonds themselves. (Anthony vs. County of Jasper, 101 U. S., 693; Coler vs. Cleburne, 131 U. S., 162, and also Simonton on Municipal Bonds, Section 101, and cases cited.)

Under the recent decision of the Supreme Court of Colorado, in the case of the Board of County Commissioners of Lake County vs. Joseph Standley (MSS. unpublished, dated January 18, 1897), the assessed valuation of 1880 *measures* the power of the defendant county in the contraction of the indebtedness of the bonds in suit. The ultimate limit of power to contract indebtedness at the time the bonds in suit were issued is shown to be $66,758.93, and the burden resting upon the county to show the invalidity of the bonds, under the decision of the Supreme Court above cited, it was incumbent upon the county to make competent proof of the outstanding indebtedness, the sum of the bonds in suit being $50,000, and less than the admitted ultimate limitation, by vote, of the power to issue the bonds in question. The ultimate limit being the only one of which the purchaser is bound to take notice, it follows that, although the bonds on their face show the whole issue to be $50,000, yet the sum of the whole issue is within the ultimate limit of Section 6 of Article XI of the constitution cited.

Counsel for defendant in error on pages 34 to

43 of their brief undertake to avoid the consequences of the failure of the county to evidence, in this case, the amount of the outstanding indebtedness, by semi-annual statement, when the bonds in suit were issued, by showing that as provided in other sections of the statute, records are required to be kept of the various acts of the various officers of the county, which altogether constitute the basis upon which the semi-annual statement rests, and from which it is made, as required by Section 457, cited *supra*. It requires no argument to refute the position of opposing counsel so taken, for the reason that the semi-annual statement provided for by the law is provided as a *summary statement* made up from all the other records of the county existing, being and remaining in the several offices of the county officers, from which the county board is required to make the *summary* provided for in the law of semi-annual statements. It would be absurd to contend that a purchaser would be compelled to delve in the voluminous and musty records of the county, extending over all the years of the county's existence, to ascertain the amount of the county's indebtedness outstanding. Such a task would employ such purchaser to such an extent as to *wholly deter him*, and all others, from purchasing any bonds the county might issue; hence the object of the semi-annual statement was and is to provide a *summary statement* of the records of the county and place it upon record, thus furnishing a summary statement of the conclusions to be derived

from all records of the county, showing the outstanding debt, and the statute having provided for the making and recording of such *summary statement* of *all* the county's financial records, it is apparent that such *summary statement* was INTENDED TO SUPERSEDE and take the place of *all other records*, and necessarily excludes them from consideration, in evidencing the outstanding indebtedness of the county.

III.

The construction of the article of the constitution under consideration, which I desire to urge upon the Court at this time, is presented in the light of the amendment to that section, adopted by the people of the state of Colorado at a general election held in said state on the sixth day of November, A. D. 1888.

That amendment has been adopted *since* the questions which have heretofore arisen under that section of the constitution were adjudicated in the case of People *ex rel.* Seeley vs. May. County Treasurer, 9 Colo., 80 404, and Lake County vs. Graham, 130 U. S., 674 684, and to my mind affords a guiding light which upholds our contention which is now made in the case; consequently, there is no antagonism or inconsistency between the present contention and the contentions heretofore made in the arena of the Courts in construing that section of the constitution as it stood prior to such amendment, with reference to the subjects involved in prior litigation.

The indebtedness now under consideration is entirely another and a different indebtedness from that with which the litigation referred to was connected. Here the indebtedness under consideration consists of BUILDING BONDS, with the coupons thereto attached, issued for the purpose of raising money to build a court house for the County of Lake, one of the "favored" purposes mentioned in Section 6 of Article XI of the Constitution of Colorado, and we shall presently see that the obligations issued for those favored purposes are under the protection of the constitution itself and have a *different character* and more *favorable status* than that of the indebtedness of the funding bonds, heretofore considered by the Courts in the cases referred to. In reference to this particular indebtedness, my contention in the construction of the section of the constitution under consideration, as amended November 6, A. D. 1888, is, that, with reference to the indebtedness incurred on account of the favored purposes mentioned in the section, viz.: "Erection of necessary public buildings, making or repairing of public roads or bridges," the constitution makers intended to place *no other* limitation upon the power of counties in the contraction of indebtedness for those purposes than the requirement of a *vote* of the qualified electors of the county, who in the year last preceding such election shall have paid a tax upon property assessed to them in such county. The phraseology of the section is special with reference

to the indebtedness for those favored purposes, whereas it is *general* with reference to all other indebtedness that might come within its provisions. It is plain to my mind *now*, after all that has gone before in the discussion of the meaning of this section of the constitution, that this clause, "*Unless*, when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt," clearly authorizes the incurment of a debt for those favored purposes by the *consent* of the *taxpayers* in a sum *beyond any and all* of the limitations of this section of the constitution, that, in fact, it authorizes the taxpayers to incur a debt in *any amount*, for those favored purposes, that they shall see fit, by a vote, to assent to.

There does not seem to be a limitation here, except by vote, of the power to contract debts in the ordinary manner. The debt having been authorized by a vote may be incurred in the ordinary way and evidenced by the execution and delivery of any obligation to the extent of the sum voted, so it does not amount to the *contraction* of the debt by the *issuance* of bonds.

This language relative to "bonds" plainly shows that the makers of the Constitution understood at this point that they were dealing solely

with debts contracted by the issuance of bonds, because no other manner of contracting was under consideration, and hence the words "so contracted" necessarily means "contracted by the issuance of bonds," for unless contracted by bonds the debt could not be said to be "so contracted" within the meaning of the language here used to designate the subject (bonds) under consideration, and this language as to bonds on the principle of the maxim *expressio unius est exclusio alterius* excludes from the bond limitation contraction through the use of all other forms of indebtedness. We argue this distinction here, to enforce our construction of the use of the words "so contracted," and insist that those words necessarily mean the contraction by bonds *only*, and if we are right in this conclusion, then the other conclusions of our argument are tenable.

The language, as will be seen, immediately following that last above quoted, is as follows: "But the bonds, if any (?) be issued therefor, shall not run less than ten years, and the aggregate amount of *debt SO contracted* shall not at any time exceed twice the rate upon the valuation last herein mentioned." Clearly to my mind the words "*debt SO contracted*" refer to the amount of indebtedness incurred for favored purposes *by the issuance of bonds* upon a vote had, and not to the amount of debt contracted *otherwise* than by the issuance of bonds evidencing the same.

It seems now clear to my mind that the fram-

ers of the constitution intended to allow the taxpayers to create any amount of debt for favored purposes, beyond the amount limited in other parts of the section for general purposes, *provided* the question of incurring the same was submitted to a vote of the taxpayers, and a majority of those voting voted in favor of incurring the debt; the constitution makers intending that such debt might be dealt with by the county board somewhat on the principle of "pay as you go," by the levy of taxes to discharge the same, upon the taxable property of the county, if the county chose to deal with it in that manner *instead* of by *issuing bonds*. In other words, I argue that the *true* construction and spirit of the section, as applied to debts contracted for favored purposes, was and is, as if the framers of the constitution had said: "You, the taxpayers of any county, provided you are willing to pay as you go, by the levy of taxes *instead* of *issuing bonds*, may incur an indebtedness for favored purposes, in any amount which a majority of you voting thereon at an election shall assent to, but you shall not saddle posterity with a *bonded indebtedness* beyond the sum specified in this section." This idea is amply contained in many constitutions of many states of the Union, notably in those of the states of Georgia, California, Idaho and Missouri. The constitutions of those states provide similar limitations upon incurring *bonded* indebtedness. Our constitution provides that a bonded indebtedness for favored pur-

poses, if any be issued therefor (?), shall not run less than ten years, and the aggregate amount so contracted (that is, by bonds for favored purposes) shall not at any time exceed twice the rate upon the valuation last herein mentioned." "BUT THE BONDS, IF ANY BE ISSUED THEREFOR." (?) This is as much as to say a debt may be contracted by vote without the issuance of bonds and dealt with in payment as other ordinary county debts, viz.: by taxation.

I think the framers of the constitution thought it perfectly safe to leave the question of the incurment of such indebtedness to a vote of the taxpayers, and that when they said in effect to the taxpayers that if they contracted indebtedness beyond the amount specified in the section, they must be prepared to pay it by the levy and collection of taxes upon their property at once, they thought it would operate as a sufficient restraint upon an extravagant or unnecessary appropriation of public funds. These views seem to be sustained by the address submitted by the framers of the constitution to the people on its adoption, a portion of which address is as follows:

"By the provisions of this article we have prohibited the Legislature from lending the credit of the state in aid of any corporation, either by loan, or by becoming a subscriber to any stock, or joint owner with any party, except in case of forfeiture and escheat, and from assuming any debt or liability of any party, and have also required the appropria-

tions to be kept within the limits of our resources, and that no appropriations be made *unless assessments are also made sufficient to meet them, and at the same session of the Legislature.* The SAME PRINCIPLES are applied to counties, cities, towns and school districts as *far as applicable, with an* ADDITIONAL SAFEGUARD, *that to increase the indebtedness in excess of the* RATES FIXED *in this constitution a* VOTE OF THE PEOPLE *must be had thereon.*" (See address, Mills' Ann. Sts., Vol. 1, 102, sub. 206.) All the limitations fixed, are declared off by a vote of the taxpayers. These expressions in this address clearly indicate the understanding of the framers of the constitution, and are quite consistent with the language of the constitution itself. Mark the language "that to increase the indebtedness in *excess* of the *rates fixed,*" in other words, the limitations; the ultimate limits fixed by the section. This language clearly implies, first, a "fixed" absolute "rate" or limit, by the section itself; and second, the abolition of the rule absolute by a vote of the taxpayers, and the fixing of the limitation co-extensive with the amount voted by the taxpayers. The language clearly allows the contraction of debts without bonds, without further limitation than by a vote of the taxpayers, and *this being seen* by the general assembly when they formulated the amendment, they acted accordingly, and deeming the debt of the bonds valid declared it "an *indebtedness* outstanding," and addressed themselves *only* to ex-

panding the power to contract *debts by loan by the issuance of bonds to liquidate* such *indebtedness.*

The Supreme Court of Colorado in the case of People *ex rel.* Seeley vs. May, Treasurer, 9 Colo., 89, says of the address: "IT HAS THE RANK AND CHARACTER OF A STATE PAPER, ISSUED TO THE PEOPLE BY THEIR CHOSEN REPRESENTATIVES IN CONVENTION ASSEMBLED, AT A MOST IMPORTANT PERIOD OF THEIR HISTORY AND UPON QUESTIONS OF THE FIRST MAGNITUDE."

True, the Court in the case cited, in construing the section of the constitution under consideration, held it to be a limitation upon the power to contract the indebtedness involved in that case, which was incurred without a vote of taxpayers, and was a county warrant for $15.40, to pay a debt not incurred for the purpose of erecting necessary public buildings, or making or repairing public roads or bridges. In the case at bar the indebtedness was incurred by a vote of taxpayers for the purpose of erecting public buildings, viz.: a court house, and hence the case of People *ex rel.* Seeley vs. May is not *stare decisis.* Nor is the case of Lake County vs. Rollins *stare decisis* for the same reason. The case at bar is clearly an exception to those cases.

The indebtedness in the case at bar was contracted prior to the decision of the Supreme Court of Colorado cited, and hence the national courts are not bound to follow the decision of the Supreme Court of Colorado in construing the section of the constitution under consideration.

In such cases the national courts hold that it is their province to determine the law of the case, independent of decisions of the state courts rendered subsequent to the contraction of the indebtness in suit. Douglas vs. County of Pike, 101 U. S., 686; Gelpecke vs. Dubuque, 1 Wall., 206; Burgess vs. Seligman, 107 U. S., 33; Greene County vs. Commissioners, 109 U. S., 104; Pana vs. Bowler, 107 U. S., 540; Carroll Co. vs. Smith, 111 U. S., 556; Anderson vs. Santa Anna, 116 U. S., 356; Bolles vs. Brimfield, 120 U. S., 759.

We are not aware that the views herein given of the section of the constitution under consideration have ever been presented to this or any other Court, outside of this case, and they are here presented to the serious consideration of this Court in the light of the *proviso* added by way of amendment to the section, as before stated.

The proviso was considered and adopted by the people November 6, A. D. 1888, and taken in connection with the section as it originally stood, is a significant piece of law enforcing our position in reference to the meaning of the section of the constitution as it originally stood. And I argue that the proviso takes the debts therein mentioned, viz.: Those contracted prior to December 31, 1886, out of the operation of the section of the constitution as it originally stood, and validates, *by treating them as valid*, all such debts, so that at this time, the indebtedness being seen to be valid under the constitutional amendment, cannot be

assailed and overthrown by virtue of anything that precedes the proviso in the section as it now stands. The effect of the proviso is to ratify, confirm and validate the county debts in the case at bar, they being in existence prior to December 31, 1886, and are specially named in the amendment, and that was clearly the intention of the people in adopting the amendment to the section. This purpose appears from the fact that the proviso provides chiefly for the contraction of a debt by loan by the issuance of bonds for the purpose of *liquidating* the indebtedness, that is to say, the indebtedness which existed and was outstanding prior to December 31, 1886. The debt in the contemplation of the makers of the amendment was viewed as valid, and held as such for the purposes of the amendment, and therefore the provisions of the amendment were directed towards the contraction of a debt by loan by the issuance of bonds for the purpose of liquidating such valid indebtedness. From the standpoint of the framers of the amendment, there could be no discrimination between the debts enumerated and outstanding; all from *necessity* had to be recognized and treated as valid, whether any of it was or was not invalid.

The proviso, in dealing, as it does, only with the contraction of an original debt by loan, by the issuance of bonds for the purposes of liquidating such outstanding indebtedness, not dealing in any other manner with the indebtedness referred to, but leaving it in its original status, under the con-

stitution, the people in adopting the amendment meant to be understood as construing the section as it originally stood favorable to the contraction of the indebtedness referred to, as we have hereinbefore argued, by a vote only.

The section as it originally stood provided a limitation upon the power of contracting a debt for favored purposes, viz.: by vote of the taxpayers, and also, lastly, provides a limitation upon the amount of the issue of bonds for such purposes; whereas, the proviso deals simply with the bonds to be issued under it, enlarging the power to issue bonds, the makers evidently proceeding upon the assumption that a debt for favored purposes contracted in pursuance of a vote, was valid, without further action, and that all that was necessary was to enlarge the power to issue bonds in liquidation of the same.

We say, then, that in the light of the amendment, the general assembly which framed, and the people who adopted it, have put a construction upon the section of the constitution as it originally stood, which validates the debt of the bonds in controversy, that they intended, in that manner, to declare the said bonds valid, and as an *evidence of such intention*, authorized the issuance of new bonds to loan money to liquidate such valid indebtedness. We argue, then, that in this manner the people have validated the debt of the bonds in controversy, and that, having done so, they have taken such debt out of the limitations of the sec-

tion of the constitution as it originally stood, declaring the limitation, if any, off as to the *issuance of bonds* therefor, to the extent of the indebtedness outstanding prior to December 31, 1886, and given plenary power to the defendant county to properly deal with the same in the right administration of its affairs. The makers evidently appreciated the difficulty and inexpediency of immediate taxation to pay off the debt thus held valid, and so provided a safety valve in the contraction of a debt by loan by the issuance of bonds to liquidate the same, which the county and tax payerscould avail themselves of if they so chose.

The language of the first lines of the proviso, viz.: "*which has an indebtedness outstanding*," specifically refers to the bonded indebtedness involved in this action, as such indebtedness was outstanding prior to December 31, 1886, and consists of public building bonds, issued for a favored purpose, viz.: to raise funds to build a court house. The debt of the bonds is thus specifically recognized and characterized as a valid and subsisting indebtedness for the purposes of the provisions of the amendment relative to contracting a *new* and independent debt by loan to liquidate the same. Mark the language used: "May contract a debt by loan by the issuance of bonds for the purpose of liquidating SUCH INDEBTEDNESS." The existence of an indebtedness was and is a CONDITION PRECEDENT to the contraction of a new debt by loan to liquidate the same under the provisions of the amend-

ment. If an indebtedness did not and does not exist, can or could a loan to liquidate be lawfully made thereunder? If, therefore, the amendment was not intended to, and does not by its adoption, ratify and validate the debts dealt with, then the debts contracted by loan by the issuance of new bonds, under the amendment to liquidate the original debt, possibly would, if the original debt was invalid, also be invalid and voidable under the authority of the cases of Lake County vs. Rollins, and Lake County vs. Graham. 130 U. S., 662, *et seq.*, and District Township of Doon vs. Cummins, 142 U. S., 366.

The amendment provides for no procedure under, or outside of it, by legislation, for validating the indebtedness outstanding prior to December 31, 1886, to liquidate which express authority is conferred to contract a new debt by loan, and the fact that no such procedure is contemplated or provided for, is INDUBITABLE EVIDENCE of the intention of the framers to validate the indebtedness dealt with by the adoption of the amendment, and an unanswerable argument that such indebtedness is validated by the adoption of the amendment itself *ex vi termini*. Unless, therefore, the indebtedness enumerated in the amendment, if any part of it was therefore invalid, was and is ratified and validated by the amendment, the proposal and adoption of the amendment was an idle ceremony, as, in case of non-validation, it utterly fails of its purpose. The only procedure provided for in the amendment is

that relative to the issuance of the bonds to contract a debt by loan to liquidate, such procedure does not contemplate acts thereunder to validate the outstanding indebtedness, nor do the proceedings contemplated validate the same, nor was it intended so to do, nor was the dealing with the same in validation by vote or otherwise, aside from the force of the amendment itself, in view by the framers of the amendment, and if the adoption of the amendment did not *ex vi termini* validate the debt, if the debt was invalid, the same remains invalid, and bonds issued to liquidate the same are voidable, from which it is evident that the language of the amendment, viz.: "which has an indebtedness outstanding," was intended, *ex proprio vigore*, to hold and treat the indebtedness enumerated as valid, and, if so, such indebtedness cannot now be questioned as to its validity in any action or proceeding had to secure payment. The language of the amendment is: "The question of ISSUING SAID BONDS shall, etc., be submitted," etc., not "The question of VALIDATING said INDEBTEDNESS shall be submitted," etc. The procedure provided in the amendment to issue the bonds proceeds upon the assumption that the amendment, when adopted, validated the indebtedness enumerated in the amendment, if invalid, and therefore the amendment only provides procedure for the issuance of the bonds in the event that the County Board concluded to deal with the indebtedness in liquidation in that manner. Suppose the bonds contemplated

by the amendment were voted by the taxpayers, and the County Board refused to issue them for the purposes of liquidation, as contemplated by the amendment, on the ground that the outstanding indebtedness *was invalid*, because in excess of the limitations of the section of the constitution, as it was before it was amended; if the adoption of the amendment does not *ex vi termini* ratify and validate the indebtedness referred to, could the County Board be compelled by *mandamus* to issue the bonds voted to liquidate the indebtedness, if, in fact and law, the indebtedness was invalid for being in excess of the limitations of the section of the constitution as it stood before amendment? *I think not.* So, then, we reach the inevitable result flowing from the situation, if the amendment did not, *eo instanti*, on its adoption, by its own force, ratify and validate the outstanding indebtedness enumerated therein, and dealt with thereby, viz.: THE FAILURE OF THE AMENDMENT TO ACCOMPLISH THE PURPOSE FOR WHICH IT WAS INTENDED. On the other hand, the law in force when the amendment was adopted, providing the procedure for the issuance of the bonds, specifically provides that the bonds shall be issued if voted, the language being, "shall make and issue coupon bonds of the county," etc. (Section 672, General Statutes, 1883, and Section 449, General Laws of 1877, cited). And the amendment to the constitution under consideration also provides that the bonds to be issued thereunder

SHALL BE ISSUED by the County Board, when voted, to loan money to liquidate.

It is thus seen that the amendment expressly provides that the bonds authorized at such election "shall be issued and provision made for their redemption in the same manner as provided in said law," and the section of "said law" cited, expressly provides that the County Commissioners, when authorized by a vote, "shall make and issue coupon bonds of the county," etc. So that the language of the amendment itself, as well as that of the law, providing for effectuating that part of the amendment concerning the issuance of new bonds, expressly provide, that when voted, the bonds shall be issued in accordance with the vote had, thus conclusively demonstrating the clear intention of the framers of the amendment in framing and submitting it to the people for adoption, and that of the people in adopting it, to put the seal of ratification upon the indebtedness as valid, otherwise they would not have made the issuance of the bonds voted under the amendment *compulsory* and provided no procedure for ratification, they would hardly have compelled the counties to liquidate an indebtedness which, after the adoption of the amendment, in their minds was considered invalid; therefore, considering as they did, that the adoption of the amendment validated the indebtedness, they made the issuance of the bonds, after a vote, *compulsory* upon the County Board. Considering the indebtedness validated by the amendment, if

adopted, the framers were chiefly concerned in providing means to remove the limitation upon the power to contract a debt by loan by the issuance of bonds, to liquidate the indebtedness validated, and so *only* provided procedure to issue bonds to liquidate. Nor did the framers mean to confine the effect and operation of the amendment to indebtedness which was *per se* and *ipso facto* valid under the section of the Constitution as it stood prior to amendment, for the reason that such limitation of the amendment would have defeated its clear purpose, viz.: To afford *definite* and certain *relief* from the embarrassments of Colorado County administration, resulting from the decisions of the Courts, construing the provisions of the Constitution under consideration, and thereby relieve the State from the odium of repudiation by COMPELLING payment.

The General Assembly, by employing the word "indebtedness," in naming and designating the subject they were dealing with, meant nothing less than the entire outstanding debt in the forms named, resting solely upon moral obligation or otherwise; for it was undoubtedly considered, that although a part of the indebtedness was probably contracted and incurred without sanction of law, yet substantial benefits had accrued therefrom to the counties, in the form of public buildings, roads and bridges, and by way of aid in county administration, which put them under, *at least*, a moral obligation to pay them in whole or in part, and acting

with that view and to that end, the amendment was formulated, submitted and adopted as we find it, to settle and avoid all further contention and uncertainty concerning the subjects considered, and restore the credit of the State, and it were idle to say that with that purpose in view, validation by force of the adoption of the amendment *ex vi termini* was not intended.

Again, the words "indebtedness outstanding," refer to the body of the whole county debt enumerated without distinction and regardless of its character. The whole, entire debt was in the mind of the legislative assembly when the amendment was formulated. All was viewed and considered in the legislative mind for the purposes of the amendment. In the very nature of things, no discrimination between the debts could have been made, or intended, as the whole debt was to be dealt with, and as such, contemplated as *prima facie*, valid and lawful; so that the words "indebtedness outstanding" of necessity mean all outstanding county evidences of debt in all the forms enumerated. The amendment is an *explicit recognition* as VALID of all *prima facie* forms of indebtedness and obligations of debt enumerated as subjects for its operation. See City of Huron vs. Second Ward Savings Bank, as to significance of the word indebtedness used. The language is general and does not distinguish between the one debt or the other, and hence means all, without exception, outstanding in the forms specified; *prima facie* they were

and are all debts in a legal sense, and were and must be viewed as such until specifically declared to be otherwise by a Court of competent jurisdiction, and being thus viewed and held in the mind as valid and lawful by the framers of the amendment, provision was made for the "liquidation of such indebtedness." What indebtedness? Why the indebtedness *in mind* enumerated and outstanding, in its various forms, designated and specified; that apparently valid indebtedness outstanding prior to December 31, 1886, about which there has been a discussion, all that indebtedness, questioned and unquestioned, as to its legality, outstanding prior to the date named; that debt, which might be valid or invalid under Section 6 of Article XI of the Constitution, before this amendment, as the same was construed by the Supreme Court; that is, "*the* indebtedness" WE RATIFY and authorize you to borrow money to liquidate, and pay it, and authorize the contraction of a debt "*by loan*" by the issuance of bonds for the purpose of "liquidating *such* INDEBTEDNESS," and make the obligation of the same certain, in such amount as shall be required. There is now, on the submission of the amendment, an uncertainty as to its character and amount, such character and amount are not fixed and ascertained, they might be ascertained by other proceedings in the Courts, which would be expensive, full of delay and against public policy, therefore, *validate* the debt by *adopting* the amendment, by which power is given under it to contract

a debt by loan, by and before the *usual forum* of the people, at a popular election to *liquidate* the same, if desired, thereby avoiding all further embarrassment and ill-repute.

Again, the Legislature, in submitting the amendment, intended to place a limit on its force, and therefore confined its force to indebtedness outstanding December 31, 1886. That fact evidences the purpose to confine the amendment's force to retrospective action and to exclude prospective operation, and the apprehension of that intention affords a view of the further intention, viz.: To continue the section as it was as to contraction of *future debts*, and to obliterate the invalid past by *present validation*. *Ex uno disce omnes.* We thus apprehend and clearly see the purpose of the framers of the amendment to *validate* the *debts enumerated* and outstanding, and stop there, as to all other debts of a like character contracted after December 31, 1886.

The adoption of the amendment was tantamount to declaring that the past was legalized, while the future must remain under the constitution and the law as it was, and is found to be, as to limiting the power of contracting future indebtedness. The act submitting the amendment was passed April 4, 1887, and the amendment was adopted by the people November 6, 1888. Why did the law-making power apply the amendment retrospectively only, and to indebtedness outstanding December 31, 1886; why did they not apply it

to all debts incurred after December 31, 1886? The reason is apparent. The date designated December 31, 1886, was about the date of the last decision of the Colorado Supreme Court, in which that Court finally adhered to its construction of the constitution as enunciated in People *ex rel.* Seeley vs. May, 9 Colo., cited, the original decision having been rendered by Elbert, J., a year before. During the period intervening between the first and last decision, the several counties of the state had followed the rule of the constitution as enunciated by that court, and as a consequence they had ceased to incur debts in excess of the limits of Section 6, Article XI, about December 31, 1886. In the light of events, it was therefore known that all debts which were of doubtful validity were incurred prior to the date named, and hence the restriction to that date discloses the purpose to validate, and that purpose seems to be manifest in the selection of the date named, and by confining the force of the amendment to indebtedness "outstanding" at such date. The word outstanding seems to be chosen by reason of its legal significance. If the expression "indebtedness contracted and unpaid" had been used, a sense of restriction to legal indebtedness might have been inferred, for the reason that an illegal obligation could not be said to have been contracted. The General Assembly, by the use of the word "outstanding," avoided a restrictive sense, and by that word intended all the "indebtedness" extant and named,

valid and invalid, not dealt with in liquidation, unpaid, uncollected; as an outstanding draft, bond, premium, or other demand or indebtedness. (Anderson's Dictionary, 741.)

The amendment is in the form of a PROVISO, and as such is intended to *suspend* the *operation* of the section as it *originally* stood upon the *subjects named* in the *proviso*, and thereby excepted from the operation of the section as it originally stood the subjects of the proviso which, but for the proviso, would otherwise be within the same. Sutherland on Statutory Construction, Sec. 222, notes and cases cited, page 294.

The amendment should be construed in the light of the mischief it was designed to remedy: (Cooley Con. Lim., 4th edition, pages 79 and 80) and the mischief was apparent, as witness the uncertain condition of the outstanding county indebtedness as to validity and the general embarrassment in county administration, brought about by the decision of the Supreme Court of Colorado, in People *ex rel.* Seeley vs. May, 9 Colo., 80, 404, 415. The situation was such that the valid could not be distinguished from the invalid, if any, without resort to some proceedings, judicial or otherwise, hence the proposed procedure by amending the constitution, *thereby ratifying all* the outstanding indebtedness enumerated, and relieving the embarrassments of the situation, by authorizing the issuance of NEW BONDS, as provided in the amendment, to liquidate the indebtedness validated.

Taxation was available to liquidate it, but that in a majority of cases would have been, and would be, oppressive upon the taxpayers. The relief by raising money by contracting a debt by loan was therefore *necessary*, and hence provided for. The chief concern of the framers of the amendment seemed to be the enlargement of the power under the section of the constitution amended, to contract a debt by loan by the issuance of bonds. They were fully alive to the fact that the section amended provided a limitation upon the power to contract *debts by loan by bonds*, and, desiring to extend such power, commensurate with the debt outstanding, to enable counties to obtain funds to liquidate the indebtedness validated, and which they intended to validate, they provided procedure *only* relative to the issuance of bonds to contract a debt by loan, to liquidate, and conferred such extended power upon the *same conditions* as the original power is conferred to contract debts in the first instance by loan, viz.: *by a vote of the taxpayers*, so that on a vote of the taxpayers, the power to issue bonds to liquidate, to the extent of the outstanding indebtedness validated, was, and is, conferred by the amendment, notwithstanding the fact that in incurring such indebtedness, the limits of the section as it originally stood might have been exceeded, and thus the indebtedness was, and is, held and treated as valid by the amendment, and thus ratified and validated *without any*

further action of any forum or tribunal whatever. That fact seems to be plainly demonstrated.

The fact that the amendment extends the power to contract a debt by loan, to the extent of the outstanding debt enumerated, to liquidate the same, and provides no procedure whatever to validate the debt, is conclusive evidence of an intention and purpose to validate the debt by the adoption of the amendment, on the part of the framers, and an unanswerable argument that such debt is, by consequence of the submission and adoption of the amendment, validated.

I submit that the history of the State contemporaneous with the proposal and adoption of the amendment, of the causes which led to such adoption, and the discussions and issues before the people at the time of the submission of the amendment by the Legislature, as well as at the time of its adoption by the people, are legitimate sources of information as to what was intended by it, and hence as to what significance should be given to it. On turning to the history of the events of those times, we recall a state-wide disputation and discussion of Section 6 of Article XI. of the Constitution, out of which came the cause of People *ex rel.* Seeley vs. May, cited, and other decisions of the Supreme Court of Colorado, construing the section as a GENERAL LIMITATION upon the powers of counties to contract ANY AND ALL indebtedness; also the case of Rollins vs. Lake Co., 34 Fed. Rep., 845, in which Brewer, J., held to the contrary, May 7, 1888.

These decisions fixed by judicial interpretation the meaning of Section 6 of Article XI. of the State Constitution, as it stood before the amendment, which substantially invalidated a portion of the debt of the several counties of the State outstanding. By an act passed April 4, 1887 (Laws of 1887, page 27, Section 2), the General Assembly proposed and submitted to the people of the State the amendment under consideration, and the same was adopted by the people November 6, 1888, at the general election, at which members of the General Assembly were elected. These events, then, fairly show that the amendment proposed was for a SPECIAL and LIMITED PURPOSE. Evidently the amendment was designed to relieve the situation of embarassment, by validating the indebtedness enumerated, and conferring power on the counties to contract a debt by loan in aid of the liquidation of such indebtedness. The true status of the indebtedness as to validity or invalidity was unknown, in view of the decisions of the Courts, in the cases referred to. Here, then, was a reason and cause for the adoption of the amendment, and when this purpose is discerned, the amendment will be construed to accomplish the purpose rather than to defeat it.

The construction of a statute should always be such as, if possible, not to lead to injustice or absurd consequences, and infringe as little as possible on the existing rights of individuals. Or, as the rule was expressed by this Court in United States

vs. Kirby, 7 Wall., 486, "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always be presumed that the Legislature included exceptions to its language which would *avoid results of this character.* United States vs. Fisher, 2 Cranch, 358; Chinese Merchant Case, 13 Fed. Rep., 605; Southern Pacific Railroad vs. Orton, 32 Fed. Rep., 457, 477; Springfield vs. Edwards, 84 Illinois, 626."

In Lake County vs. Rollins, 130 U. S., 670, 671, this Court said: "To get at the thought or meaning expressed in a STATUTE, a CONTRACT or CONSTITUTION, the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of any other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the Courts nor the Legislature have the right to add to or take from it. Newell vs. People, 7 N. Y., 9, 97; Hills vs. Chicago, 60 Illinois, 76; Denn vs. Reid, 10 Pet., 524; Leonard vs. Wiseman, 31 Maryland, 201, 204; People vs. Potter, 47 N. Y., 375; Cooley, Const. Lim., 57; Story on Const., Sec. 400; Beardstown vs. Virginia, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the Legislature

should be intended to mean what they have plainly expressed, and consequently no room is left for construction. United States vs. Fisher, 2 Cranch, 358, 399; Dagett vs. Florida Railroad, 99 U. S., 72."

"There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large portion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors of a state, the most of whom are little disposed, even if they are able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."

This is peculiarly applicable here, as the amendment, by its own language and terms, denominates and characterizes the outstanding obligations enumerated as "AN INDEBTEDNESS," and the people in adopting it must therefore be taken to have meant exactly what the amendment plainly expresses, and I submit that the simplest, most sensible and most obvious interpretation of the language used, is that thereby, on its adoption, the outstanding indebtedness enumerated was and is validated, and that such was the intention. Otherwise the most absurd consequences would result. Thus this national

Court of last resort substantially holds that the mode and manner of construing a statute, a contract or a *constitution*, are the same, as well as the principles of such construction. And in view of this doctrine, and the fact that the Proviso under consideration is curative and remedial, and should be liberally and beneficially construed, I desire to cite the authorities enunciating the principles by which the construction of such enactments should be governed. (*a*) It is the rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy: Sutherland on Statutory Construction, Sec. 207, page 274 and cases cited in note 1. (*b*) A remedial statute, not clear as to any supposed application, admits of a resort to many rules of construction to determine what the Courts are authorized to assume as the meaning and intention of the law-maker. Id., Section 347, note 4. (*c*) Remedial statutes are such as the name implies, embracing a great variety in detail; those enacted to afford a remedy, or to improve and facilitate remedies existing for the enforcement of rights and the redress of injuries; also those intended for the correction of defects, mistakes and omissions in the civil institutions and administrative polity of the State. Id., Section 207. (*d*) In the modern sense, remedial statutes not only include those which so remedy defects in the common law, but defects in civil procedure generally, embracing not only common law, but also the statutory law. They are in a general

sense remedial, whether they correct defects in the declaratory, directory or remedial parts. There are also three points to be considered in the construction of all remedial statutes—the law, the mischief and the remedy; that is, how the law stood at the making of the act, the mischief for which the law did not adequately provide, and the remedy the Legislature has supplied to cure this *mischief*. And it is the duty of Judges so to construe the act as to suppress the mischief and advance the remedy. Id., Section 409; Cooley's Blackstone's Commentaries, 86 and 87. (c) The law of remedial statutes may be extended to and include cases clearly within the mischief they were intended to remedy. *Id.*, Section 410. A remedial statute must be construed liberally and beneficially, so as to suppress the mischief and advance the remedy, and if the words are not *clear* and *precise*, such construction *will be* adopted as shall appear the most reasonable and the best suited to accomplish its object; THE CONSTRUCTION WHICH WOULD LEAD TO AN ABSURDITY WILL BE REJECTED, and generally, it may be affirmed that if a statute may be liberally construed, *everything* is to be done in advancement of the *remedy, or the intention*, that can be done consistently with any construction that can be put upon it. Id., Section 410, note 5 and cases cited. The substance of the act is principally regarded, and the letter is *not too closely* adhered to; Id., Section 410, note 6 and cases cited. (f) The Courts construe remedial statutes most liberally to effect-

uate the remedy; Id., Section 411, note 9 and cases cited. The Courts follow the reason and spirit of such statutes, until they *overtake* and *destroy* the *mischief*, which the statute was intended to suppress; Id., Section 411, note 2 and cases cited. In doing so, they often go *quite beyond the letter* of the statutes; Id., note 3 and cases cited. What is within the INTENTION is within the statute, although not within the letter; and what is within the LETTER, and not within the INTENTION, is not within the statute; Id., note 4 and cases cited. (*g*) The intention is not something evidenced *dehors* the statute; it is to be learned from it, with those extrinsic aids to a correct interpretation to which resort may be had; and that intention, when satisfactorily ascertained, is the *design* to which the letter is subordinated. A liberal construction is given to remedial statutes, and statutes generally enacted for the *public convenience* and for its material welfare; Id., Section 412, note 5 and cases cited. (*h*) Statutes are remedial which are intended to *promote the convenience of suitors;* Id., Section 437, note 4 and cases cited. So are statutes to improve the procedure for obtaining LEGAL REDRESS; Id., note 5 and cases cited. (*i*) Remedial statutes may be applied to past transactions or pending cases; Id., Section 483, note 5 and cases cited. A remedy may provide for existing rights and *new remedies*, added or substituted for those which exist; Id., Section 482, note 4 and cases cited. As a general rule, a remedial statute may be applied to past

transactions and pending cases, according to the indications of the legislative intention, and this may be greatly influenced by considerations of convenience, reasonableness and justice; Id., note 1 and cases cited. (*f*) The Legislature has power to pass curing acts which do not impair the obligation of contracts, nor interfere with vested rights; Id., Section 483, note 2 and cases cited. They are remedial by *curing defects* and *adding* to the *means* of enforcing *existing obligations;* Id., Section 483, note 3 and cases cited. The rule in regard to curative statutes is, that if the thing omitted or failed to be done, and which consists of defects sought to be remedied or made harmless, is something which the Legislature might have dispensed with by a previous statute, it may do so by a subsequent one; if the irregularity consists in doing something, or doing it in a mode which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one; Id., Section 483, note 4 and cases cited. On this principle the Legislature may validate contracts made *ultra vires* by a municipal corporation; Id., note 5 and cases cited. It may thus ratify a contract with a municipal corporation for a public purpose. Municipal corporations are agents of the state, through which the sovereign power acts in all matters of social concern. It may confer upon them, subject to such constitutional restraints as exist, power to enter into contracts, and annex such limitations and conditions to its exercise as, in its discretion, it deems proper for

the protection of public interests. (*k*) The right to *limit* involves the power to *dispense with limitations;* and in such cases as the Legislature could have authorized a contract, without previous advertisement or competitive bidding, it may affirm a contract made, although made originally without authority of law; Id., Section 483, note 1 and cases cited. (*l*) The Legislature may establish defective assessments of taxes, and municipal ordinances irregularly adopted; Id., Section 483, notes 6 and 7 and cases cited. *Where defects are relied on as an excuse for repudiating contracts, executory or executed, they are not within the protection of the constitution;* Id., Section 484, note 1 and cases cited.

These doctrines, enunciated by Mr. Sutherland in his able work cited, are elemental and entirely familiar to this Court. The whole subject of liberal construction is ably discussed, and the authorities in support thereof fully cited, in Chapter XV of the work of said author, beginning with page 521 and ending with page 572, the sections being 408 to 445, inclusive.

It seems to us that these doctrines are entirely applicable to the construction of the amendment of the Constitution under consideration. Such amendment was intended to remedy the evils of the situation in county affairs at the time of its submission to, and adoption by, the people of Colorado, and it is the duty of the Courts to construe the enactment provided to remedy the evils of the situation, *liberally*, for the purpose of reaching, overtak-

ing and remedying the evils of such situation. It was the intention to ratify the outstanding debt enumerated in the amendment and, placing its validity beyond question, provides means for successfully dealing with the same in payment. *It would have been idle to have left the question of ratification of the debt to the subordinate* county tribunal and the taxpayers of the county, as in that event the evils in view would not have been certainly overtaken and remedied, because the whims, indisposition and prejudice of the taxpayers would have defeated ratification and payment in *all cases*, especially so in the case of the defendant County of Lake. Validation of the indebtedness being accomplished by the adoption of the amendment *ex vi termini*, it was proper to leave the power to issue bonds in payment with the taxpayer to relieve himself thereby if he so chose.

Validation by ratification is not required to be shown by a single special, definite and specific act. It may be inferred or presumed from sundry acts, and from the course of dealing with the subject matter claimed to be validated. Simonton on Municipal Bonds, Sec. 247, and cases cited in note 1. In this case the forum of the people, which passed upon and adopted the amendment, was in the same position as to power as a legislative Assembly, in authorizing governmental corporations to contract debts within the limits of legislative power. Where a governmental corporation has no authority to contract an indebtedness, such contraction being

ultra vires, the Legislature may ratify the same without limit, unless restrained by a constitution, and if limited by a constitution, may ratify the same within such limits: Bolles vs. Brumfield, 120 U. S., 730; Granada Co. vs. Brodgen, 112 U. S., 261; Simonton on Municipal Bonds, Sec. 247, cited.

The unauthorized acts of public officers may be ratified, either by some express act of the corporation or by the subsequent course of dealing of the corporation, relative to the unauthorized act, from which the ratification will be presumed; as, for instance, retaining the proceeds of the act, or acquiescing in it by the payment of interest on a part of the principal of the unauthorized debt. Supervisors vs. Schenk, 5 Wall., 772-781. Such ratification may be by express consent or by acts and conduct inconsistent with any other hypothesis than that of approval. Simonton on Municipal Bonds, Sec. 247.

The doctrine of these authorities is applicable to the case at bar, for the reason that the amendment to the constitution under consideration denominates and deals with the outstanding indebtedness enumerated, as a VALID INDEBTEDNESS, and the course of dealing therewith, as provided in the amendment, *of necessity* assigns the indebtedness to a position of validity; such course of dealing with the same in payment, as provided in the amendment, being inconsistent with any other hypothesis than that the people intended to, and did, approve the indebtedness as valid when they voted

upon its adoption, having in view the entire situation and all the facts and circumstances surrounding its adoption; fully comprehending and knowing that by such adoption they ratified the indebtedness and authorized its payment in the manner provided for in the amendment.

Again, it is true, original loans may not be made to pay the debt without a vote, but the debts are nevertheless validated by the amendment, and the fact that the General Assembly, in formulating the amendment, provided for a vote, *not upon the validation of the debts*, but upon a new debt by loan of money to pay them, evidences the intention to, at all events, validate *by adopting* the amendment, and to refer only the question of loaning money to pay to the voters. If it was not considered that the adoption of the amendment validated the debts, provision would have been made for validation proceedings, as procedure for loans to liquidate invalid debts would not have been provided, and it therefore follows that the fact that proceedings were and are provided to loan money to pay the debts outstanding December 31, 1886, the debts were intended to be, and hence are, ratified and validated *by the adoption of the amendment, ex vi termini*. The greater part of the debts outstanding on the date named were valid, which the General Assembly knew, but, making no discrimination, they treated and viewed *all as valid*, and intended to and did *ratify all*, and, thus ratifying,

provided for their payment by loan proceedings, and the people voted accordingly.

The procedure provided in the amendment is for the contraction of original debts by loan to liquidate, separate and distinct from the debts to be paid off, and such procedure does not, by itself, necessarily validate the debts to be dealt with in liquidation; hence, if the indebtedness being dealt with in liquidation is not validated by the adoption of the amendment, TAXPAYERS may, by appropriate actions in Court, prevent the contraction of debts by loan to liquidate the debts being dealt with, if they are invalid under the constitution as it stood before amendment, and so control all contemplated loan proceedings had to liquidate, as to confine them to debts valid under Section 6 of Article XI, as it was before amendment. Such a situation would defeat the evident purpose of the General Assembly in formulating and submitting the amendment, as well as that of the people in adopting it. No such result was intended, and it follows, as a consequence, that it was the intention of the General Assembly, and the people, to validate *all debts* enumerated, outstanding December 31, 1886, by the adoption of the amendment, and having validated the same, to confer plenary power to liquidate such debts through contraction of NEW and ORIGINAL debts by loan, by the issuance and sale of negotiable bonds to raise the necessary funds to liquidate. If the amendment does not, *per se*, ratify all the debts enumerated by it, as

valid, and only debts valid under the section amended as it stood prior to amendment are enforceable, then the submission and adoption of the amendment was an idle and useless ceremony, as all valid debts were fundable and payable under the funding statute and required no amendment of the constitution to enable counties to deal with them in payment.

I desire to say in conclusion that we rely in this case upon all of the assignments of error, made below, numbered from 1 to 46, inclusive. Numbers 3 to 16, inclusive, and numbers 17, 19, 20 and 21 cover the objections made by plaintiff to the testimony of Mr. J. W. Newell, County Clerk, relative to the outstanding indebtedness (see record, 63 to 70, for testimony) and objections which were overruled by the Court below and severally excepted to by plaintiff, the assignments being on pages 117, 118 and 119 of the record. Assignments 29, 30 and 31 cover the questions propounded to witness Parks, which were objected to by defendant, objections sustained and severally excepted to by the plaintiff (for testimony offered, etc., see record, 31–107). Assignment 24 is upon the receipt of the Warrant Registry as evidence, over the objections of the plaintiff, duly excepted to (for registry, see original record, 123; summary printed record, 74). Assignment 25 is upon the question of the receipt of the County Clerk's books in evidence, which receipt was objected to by plaintiff and overruled by the Court, and excepted to by

plaintiff (for evidence, see record, 70-73). Assignment 26 is upon the receipt of the supposed semi-annual statement in evidence, which was objected to by plaintiff, objection overruled by the Court and ruling duly excepted to (see record, 99 to 103, for statement). Assignment 27 is upon the receipt of the proceedings of the Board of County Commissioners as evidence (record, 104, 105 and 106), which was objected to by plaintiff, objection overruled by the Court, proceedings received and excepted to by plaintiff. Assignment 28 is upon the receipt in evidence of the Bond Registry, which was objected to by the plaintiff, objection overruled by the Court and exception reserved to the ruling. Assignment 32 is upon the offer of proof of the testimony of witness Parks, which was objected to by defendant, objection sustained, and exception to ruling reserved by the plaintiff. Assignment 33 is upon the offer of plaintiff in evidence of the order of the defendant board as shown at pages 124 to 129 of the record.

The order made by the defendant county board, October 18, 1886, as a result of the taking and stating by defendant of the outstanding county debt then existing, shows by comparison with the warrant registry, received in evidence by the Court below, that of the supposed debts enumerated in the warrant registry, only $14,402.67 were valid and unpaid when the bonds in suit were issued. The defendant county had the account of the outstanding debt taken at my dictation and under my

supervision, with the result stated. I drew this order of the board and had it adopted and put on record, for the very purpose of making a record of the lawful outstanding debt, and providing for its payment. The general account taken and stated was made upon similar principles, concerning the time when the annual assessment took effect, to those enunciated in the recent case in the Colorado Supreme Court of Board vs. Standley, and the order of the board was made as a result of such account. If the account taken was and is correct (and I happen to know it is), then the order shows the valid warrant debt as outstanding and enumerated in the warrant registry when the bonds in suit were issued, and, as a consequence, shows that such debt, with that of the bonds in suit *added*, was, and is, *within the constitutional limit* (see summary, bottom of page 128 of record). Here, on the *county's own showing*, by its *own record*, required to be kept, it appears the bonds were *prima facie* valid. The Court below, therefore, erred in rejecting the evidence. The order of the defendant board will be found at pages 295 to 311 of original transcript of record, and its substance as compared with the Warrant Registry at pages 125 to 129 of the printed record. Assignments 35, 36, 37, 38, 39 a, 39 b, 40 and 36, are upon refusals of the Court below to instruct the jury as requested by the plaintiff in error. We rely upon each and all of these assignments, especially the 36th, record, 130, which is made on the Court's refusal to instruct as

asked, which instruction involves the question of *validation of the outstanding indebtedness by the adoption of the constitutional amendment under consideration* in *this case*. Assignment 42 is upon the instruction of the Court to the jury to render a verdict in favor of the defendant. Assignment 43 is upon the entry of judgment on the verdict of the Court. Assignment 44 is upon the ruling of the Court on the motion made by the plaintiff to set aside the verdict and for a new trial. The motion for a new trial is fully set forth in the record, as well as the proceedings thereon.

All these assignments are *severally* relied upon to affirm the judgment of the Court below and are here repeated as arguments for such affirmation, and while we have not directed our printed arguments specially to any particular assignment, we have had in view each and all of the assignments, and desire such argument to be considered as directed to each assignment severally, as well as to all collectively. During my conduct of the affairs of the defendant county as an attorney, it was the policy and purpose of the county to pay its outstanding Court House bonds, because a fairly good court house was had and possessed as a result of the expenditure. The court house bondholders were asked to await the result of the other litigation, before dealing with their bonds in payment. They accordingly waited. A new set of officers came into office and the old understanding was repudiated. This action is the result.

From a full consideration of all the matters involved in this case, we submit that the judgment of the Court below should be affirmed and the trial Court below ordered to enter a judgment for the plaintiff for the sum of money claimed and shown to be due him in the case as it stands below.

Not being able to be present at the oral argument of this cause, I avail myself of this mode of expressing my individual views and arguments.

DANIEL E. PARKS,
Attorney for Relator.

Supp. Brf. of Dillon, Hubbard & Dillon v Richardson for Resp't

Supreme Court of the United States.

OCTOBER TERM, 1898.

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No. 177.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, PETITIONER,

vs.

HARRY H. DUDLEY.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR HARRY H. DUDLEY.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-15-'98

IN THE

upreme Court of the United States.

OCTOBER TERM, 1898.

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SUPPLEMENTAL BRIEF.

addition to the matters stated in our main brief, we ectfully submit the following summary of our argument h shows that the circuit court erred in the admission of ence and in directing a verdict for the defendant.

"County Clerk's Account Book" is not the **Record** ired by section 30, act of March 24, 1877.

Bryan, counsel for county, says this is *not the semi-an- statement book* (*Record, p. 64*; our Brief, p. 40).

So does **Newell,** county clerk (Record, p. 69).

So the extract itself shows (Record, p. 70.)

Therefore this is not the *record* prescribed by section 30, act of March 24, 1877.

2. *The extract from the county clerk's ordinary account book here offered* **does not contain the things required by section 30,** act of March 24, 1877. (See section 30, our Brief, p. 55, and compare with the extract from account book, Record, pp. 70–73.)

3. *This account was* **not made by the County Commissioners.**

(*a.*) Does not *purport* to be made by them, but by *clerk.*

(*b.*) No proof it was made by the commissioners.

(*c.*) The statement which was taken from a newspaper (which also was *not recorded*), and which was put in evidence as *Exhibit 29* (Record, p. 99), was the statement, if any, which was made by the commissioners. As that statement is *not the same as the extract* from the County Clerk's Account Book, they cannot both be *the statement made by the commissioners.*

4. *This account* **does not show anything but the clerk's side of the account.** Warrants are drawn by the clerk on the treasurer. This account does not show how much money the treasurer had on hand to pay warrants or what had actually been paid by the treasurer. In short, this showed only one side of an account and proved nothing as to amount of debt, because it did not show treasurer's account.

5. *This account does not show even the clerk's side of the account* **on the dates when the bonds were issued.**

II. **Warrant Register** (Record, pp. 73–'4).

1. This, too, is the county clerk's book, and *shows only the* **"issuance"** of warrants. Mr. Bryant, counsel for county, stated this when he offered it in evidence (Record, p. 73). Does not show how much money the treasurer has to pay them, or how many are actually paid by the treasurer.

To introduce this warrant register in evidence as showing the debt of the county is like introducing in evidence the **stubs** of a man's ordinary check book in order thereby to prove the debts owed by him. Neither the warrant register nor the stubs of a check book prove anything as to how much the debt is on the warrants or on the checks. To ascertain that fact you must go much further, and prove how much *money is in the hands of the county treasurer to pay the county warrants* and how many are actually paid, or how much money is in the bank to pay the man's checks and how many are actually paid.

III. **The statement published in the newspaper** (Record, pp. 99–103).

1. *Not a part of the records of the county.*

No pretense, even, that this is a part of records of county. It is merely a clipping from an *extinct* Leadville newspaper. Must a *bona fide* purchaser of bonds in Washington or New York or Boston notice the files (if there be any) of an extinct newspaper? Where shall he look for them?

See *Coloma vs. Eaves*, our Brief, p. 27.

2. *This statement is* **made as of January 1, 1880,** many months before any of the bonds in question were issued, and proves nothing as to the amount of *debt of the county when the bonds were issued.*

IV. **Even if a statement were kept** *fully and exactly* **as required by section 30 of the act of March 24, 1877, still it would not constitute a record showing facts as to indebtedness of county sufficient to enable one to determine whether the constitutional debt limit had been reached.**

1. Such statement would not show, nor does section 30 require it to show, *what debt was incurred before the adoption of the constitution*, all of which is excepted by the constitution in determining whether the debt limit is exceeded.

2. Nor does section 30 require the statement to show what debt was incurred before the $1,000,000 valuation is reached; all of which is valid, even if it exceed the rates of $6 or $12 on the $1,000.

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